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SUPREME COURT OF THE UNITED STATES.

No. 234.

THE FIRST NATIONAL BANK OF CINCINNATI, PLAINTIFF IN ERROR,

vs.

FREDERICK BURKHARDT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED OCTOBER 6, 1877.

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1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and southern district of Ohio, begun and held at the court-rooms in the city of Cincinnati on the first Tuesday of April, being the third day of that month, in the year of our Lord one thousand eight hundred and seventy-seven and of the Independence of the United States of America the one hundred and first. Present, the honorable Philip B. Swing, one of the judges.

Among the proceedings had were the following, to wit:

FIRST NATIONAL BANK OF CINCINNATI
vs.
FREDERICK BURKHARDT. } 2129. Action for money only.

Be it remembered that heretofore, to wit, on the ninth day of October, in the year of our Lord one thousand eight hundred and seventy-five, came the said plaintiff by its attorneys, Lincoln, Smith & Stephens, and filed in the clerk's office of the court aforesaid its certain petition against the said defendant, clothed in the words and figures following, to wit:

2 *Petition.*

Circuit court of the United States for the southern district of Ohio.

THE FIRST NATIONAL BANK OF CINCINNATI, pl'ff,
vs.
FREDERICK BURKHARDT, DEF'T. } Petition.

The plaintiffs aver that they are a bank organized and existing under the laws of the United States, and entitled "An act to provide a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," passed Feb'y 25th, 1863, and the acts since passed by the United States relating to national banks, and having its place of business and banking house within the city of Cincinnati and State of Ohio; that previous to the 23rd of February, 1875, one John Cinnamon applied to them for the loan of a large sum of money which he then desired, and that the plaintiffs refused to loan him the same or any part thereof unless upon good and acceptable security; that to induce the plaintiff' to thereafter loan the said Cinnamon from time to time within the next ten days any sum or sums they might be disposed to loan him, not to exceed the amount of $50,000, the defendant entered into and delivered to them an agreement in the words and figures following, to wit:

3 "Whereas John Cinnamon, of Cincinnati, Ohio, is now having dealings with the First National Bank of Cincinnati, and is expected to continue such dealings, whereby sums of money are likely to become due from said John Cinnamon to said bank, now in consideration of such dealings of his with said bank, and in consideration of one dollar and other valuable considerations to us moving from said First National Bank, we do agree and hereby bind ourselves to guarantee and make good to said bank any sum or sums which may be hereafter held against said John Cinnamon, to an amount not exceeding fifty thousand dollars,

and we do hereby waive notice from time to time of the amount and extent of such indebtedness.

"Witness our hands and seals, dated at Cincinnati this 23rd February, 1875. This obligation and agreement to continue in force for a period of ten days from the date hereof and no longer.

"Cin'ti, February 23rd, 1875.

"BURKHARDT & CO."

That thereupon, acting solely upon the faith and credit of the said agreement of the defendants, and relying thereon, the plaintiffs did then and there loan the said Cinnamon, on the 23rd of February aforesaid, two sums of ten thousand dollars each, making the sum of $20,000.

The plaintiffs further aver that the defendant had notice of the said loan upon the faith of his said agreement of guaranty and payment on or before the 25th day of February aforesaid, and he then and there approved thereof.

4 The plaintiffs further aver that the said Cinnamon, though requested so to do, has not paid the same or any part thereof, but was then and has ever since continued to be wholly insolvent; that they demanded the same of the said Cinnamon on or about the 3rd day of March last, and he refused to pay the same, of which the defendant had due notice, and the said Cinnamon has ever since neglected and refused to pay the same, and was at the time of such loan and ever since has been wholly insolvent, of all of which the defendant had due notice.

The plaintiffs aver that they have frequently demanded the payment of said sum of the said Burkhardt and that he has wholly neglected and refused and still refuses to pay the same, and that there is due the plaintiffs the sum of twenty thousand seven hundred and fifty-three $\frac{23}{100}$ dollars, for which they pray judgment.

STATE OF OHIO,
County of Hamilton, ss:

Theodore Stanwood, being duly sworn, says that he is cashier of the First National Bank of Cincinnati, the plaintiff, and the proper officer of said bank to make the affidavit to this petition, and that the facts set out therein are true as he verily believes.

THEO. STANWOOD.

Subscribed in my presence & sworn to before me this 9th day of October, 1875.

[SEAL.] E. T. FRIES,
Notary Public, Hamilton Co., O.

Not'y fee, 40c., p'd by pl'ff.

5 Upon which said petition was endorsed the following precipe to wit: "For money only; am't claimed $20,000, with interest from Feb. 23rd, 1875. Issue summons returnable according to law. Lincoln, Smith & Stephens, att'ys for pl'ff."

Summons issued.

And thereupon there was issued out of the clerk's office of the court aforesaid our certain writ of summons ad respondendum against the said defendant, clothed in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon Frederick Burkhardt, citizen of and resident in the State of Ohio, if he be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the 2 Tuesday in the month of November, 1875, to answer unto the First National Bank of Cincinnati, citizen of and resident in the State of Ohio, in an action for money only, and have you then and there this writ on the 4 Tuesday Oct.

Witness the honorable M. R. Waite, Chief Justice of the United States, this 9 day of October, A. D. 1875, and in the 100 year of the Independence of the United States of America.

Attest:
[SEAL.] THOS. AMBROSE,
Clerk.

6 Upon which said writ was the following endorsement, to wit: "L. B. Harrison is security for costs. Action for money only; amount claimed, 20,000, with interest from Feb. 23, 1875, for which judgment will be taken if you fail to answer as herein required."

And afterwards, to wit, on the twenty-ninth day of October, in the year one thousand eight hundred and seventy-five, came the said marshal to whom the said writ was in form aforesaid directed and returned the same with the proceedings endorsed thereon in the words and figures following, to wit:

Marshal's return.

I rec'd this writ at Cin'ti at 10 a. m Oct. 9th, 1875, and served by true copy in Ham. Co. as follows: Personally on Frederick Burkhardt, at 4.30 p. m., Oct. 9th, '75.

W. R. THRALL,
U. S. Marshal,
By J. H. WEAVER, *D'p'ty.*

7 And afterwards, to wit, on the 12th day of November, in the year of our Lord one thousand eight hundred and seventy-five, came the said defendant, by Stallo & Kittredge and Sage & Hinkle his attorneys, and by leave of court first had and obtained filed in the clerk's office of the court aforesaid their certain answer in said cause, clothed in the words and figures following, to wit:

Answer.

Circuit court of the United States, southern district of Ohio.

THE FIRST NATIONAL BANK OF CINCINNATI
vs.
FREDERICK BURKHARDT. } Answer.

Defendant admits that the plaintiff is a bank, organized, existing, and having its banking house and place of business as alleged in the petition.

On the 23rd day of February, 1875, the plaintiff, at the said banking-house, presented to the defendant a paper writing of which the following is a copy and requested his signature thereto:

"Whereas John Cinnamon, of Cincinnati, Ohio, is now having dealings with the First National Bank of Cincinnati, and is expected to continue such dealings, whereby sums of money are likely to become due from said John Cinnamon to said bank, now in consideration of such dealings of his with said bank, and in consideration of one
8 dollar and other valuable considerations to us moving from said First National Bank, we do hereby agree and bind ourselves to guarantee and make good to said bank any sum or sums which may become due hereafter, or which may be due now, either upon obligations now held by the bank or which may be hereafter held against said John Cinnamon, to an amount not exceeding fifty thousand dollars, and we do hereby waive notice from time to time of the amount and extent of such indebtedness.

"Witness our hands and seals, dated at Cincinnati this 23rd February, 1875. This obligation and guarantee to continue in force for a period of ten days from the date hereof, and no longer. Cin., February 23rd, 1875."

Defendant refused to sign said paper writing, unless the words "or which may be due now, either upon obligations now held by the bank," were first stricken therefrom; whereupon said words were erased, and defendant then signed said paper writing and delivered it to the plaintiff. And the same as delivered was the agreement referred to in the petition. Defendant alleges that said agreement was terminated on the morning of February 25th, 1875, by notification then given by defendant to plaintiff at said banking house, and that nothing was then due or owing by said Cinnamon to the plaintiff for which defendant was liable on said agreement. Subsequently, but not until about March 3rd, 1875, plaintiff notified defendant that the plaintiff had loaned said John Cinnamon the sum of $20,000 as alleged in the petition on the faith and credit of said agreement, and further, that said Cinnamon neg-
9 lected and refused to pay the same. Defendant admits the insolvency of said Cinnamon as alleged in the petition, and that payment has been demanded of defendant, and by him refused. Defendant denies each and every allegation of the petition not hereinbefore specifically admitted.

Wherefore defendant prays to be hence dismissed with his costs.

STALLO & KITTREDGE,
SAGE & HINKLE,
Att'ys for Defendant.

STATE OF OHIO,
Hamilton County:

Frederick Burkhardt, the above named defendant, being first solemnly sworn, says that he believes the allegations of the foregoing answer to be true.

F. BURKHARDT.

Sworn to before me and subscribed in my presence this 10th November, 1875.

[SEAL.]

CHAS. C. DAVIS,
Notary Public, Hamilton Co., O.

50c. paid by affiant.

10 And afterwards, to wit, on the sixteenth day of November, in the year aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

Journal entry.—Leave to reply.

THE FIRST NATIONAL BANK OF CINCINNATI, Ohio, *vs.* FREDERICK BURKHARDT. } Money. Leave to reply.

By consent of parties the plaintiff has leave to correct a clerical error in their copy of the guaranty set out in their petition, and also to file a reply to the answer forthwith, and the same is filed accordingly.

Which said reply is in the words and figures following, to wit:

Reply.

U. S. circ. court, S. D. O.

FIRST NATIONAL BANK *vs.* FREDERICK BURKHARDT. } Reply.

And now comes the plaintiff and for reply to the answer of defendant denies that the said guaranty set forth in the petition and answer were withdrawn on the morning of the 25th of February, 1875, and denies that there was nothing due the plaintiff at said time as alleged in the answer, and denies all the facts set out in said reply.

11 LINCOLN, SMITH & STEPHENS,
Att'ys for Pl'ff.

STATE OF OHIO,
County of Hamilton, ss:

Theo. Stanwood, cashier of the First National Bank, the plaintiff, on oath says the facts set forth in the foregoing reply are true, as he verily believes.

THEO. STANWOOD.

Subscribed and sworn to before me this 15th day of November, 1876.
[SEAL.] E. T. FRIES,
Notary Public, Ham. Co., O.

40c. p'd by pl'ff.

And afterwards, but on the same day and year aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

Journal entry—Jury sworn.

THE FIRST NATIONAL BANK OF CINCINNATI, Ohio. *vs.* FREDERICK BURKHARDT. } Money. Jury sworn.

This day came the parties by their attorneys, and thereupon to try the issue came a jury, to wit: Jerome M. Clark, Jos. L. Day, Robert Harper, Paris Horton, David M. Line, Richard McBride, Kingsley Ray,

D. W. Rawlings, Isaac Smucker, Ephraim Sellers, W. H. Woodrow, and George Witt, who were duly empannelled and sworn well and
12 truly to try the issue joined between the parties, and the evidence not being finished the court adjourned the jury until to-morrow morning at nine o'clock, to which time this case is continued.

And afterwards, the trial of this cause progressed from day to day until the twenty-fifth day of November, in the year aforesaid, when an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

Journal entry.—Verdict.

THE FIRST NATIONAL BANK
vs.
FREDERICK BURKHARDT. } Money. Verdict.

This day again came the parties by their attorneys, and also the jurors heretofore empannelled and sworn herein, who upon their oaths do find the issue to be in favor of the plaintiff and do assess the damages of said plaintiff by reason of the premises at nine thousand three hundred and three dollars and seventeen cents. Whereupon the plaintiff, by its attorneys, gives notice of a motion for a new trial.

And afterwards, to wit, on the twenty-eighth day of November, in the year aforesaid, came the said plaintiff, by its attorneys, and filed in the clerk's office of the court aforesaid its certain motion for a new trial in said cause, clothed in the words and figures following, to wit:

13 *Motion for a new trial.*

U. S. circ. court, S. D., O.

FIRST NATIONAL BANK OF CIN'TI
vs.
FREDERICK BURKHARDT. } Motion for a new trial.

And now comes the plaintiff, and moves the court to set aside the verdict and grant a new trial for the following reasons, to wit:

1. The court erred in excluding evidence offered by the plaintiff.
2. The court erred in admitting evidence offered by the defendant and objected to by the plaintiff.
3. The court erred in overruling and qualifying charges asked by the plaintiff.
4. The court erred in giving charges asked by the defendant.
5. The court erred in its general charge, and in certain statements made to the jury just before they retired.
6. The verdict was against the law.
7. The verdict was against the weight of evidence.

T. D. LINCOLN,
Of Counsel for Pl'ff.

14 And afterwards, to wit, on the third day of February, in the year one thousand eight hundred and seventy-seven, to wit, at the October term of eighteen hundred and seventy-six aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

Journal entry.—Bill of exceptions allowed.

THE FIRST NATIONAL BANK OF CINCINNATI, Ohio, *vs.* FREDERICK BURKHARDT. } Money. Bill of exceptions allowed.

In this case the plaintiffs presented their bill of exceptions, which is signed, sealed, allowed and made part of the record in this case.

Which said bill of exceptions so filed and allowed as aforesaid is in the words and figures following, to wit:

Bill of exceptions.

The circuit court of the United States for southern district of Ohio.

THE FIRST NATIONAL BANK OF CINCINNATI *vs.* FREDERICK BURKHARDT.

Be it remembered that at the October term, 1876, of this court, this cause came on for trial, and the plaintiffs, to maintain the issue on their part, gave in evidence the contract of guarantee, hereto attached and made part hereof, marked Exhibit A, and offered testimony tending
15 to prove that the defendant executed the same and delivered it to the plaintiff on the 23rd day of February, 1875, and that afterwards, on the same day, and on the faith of said guarantee, the plaintiff advanced to or loaned said Cinnamon twenty thousand dollars, for which he, at the time, gave his two call notes for ten thousand dollars each, copies of which are hereto attached and made part hereof, marked B, and which said call notes were given in evidence, and also gave evidence tending to show that on or before the 25th of February, 1875, said Burkhardt was notified of such loan.

Plaintiff also offered evidence tending to prove that Cinnamon was then and ever afterwards continued wholly insolvent; that on or about the 3rd day of March, 1875, the plaintiff demanded payment of said call notes of said Cinnamon, and payment was refused, and that defendant had notice of such demand and refusal the same day; that nothing had ever been paid upon the said call loans but the sum of $601.90 received from the assignee of Cinnamon, and that there was due up to the 3rd of October, 1876, the first day of the term, the balance of $21,331.43.

The plaintiff also gave evidence tending to show that the erasure made on the said guarantee of the words, "or which may be due now, either upon obligations now held by the bank," and the erasure of the date "16th" and the putting over it "23rd" were made before the signing and delivery of the same, and that when signed by the defendant and delivered to the plaintiff it was in the same condition in which
16 it was when so offered; that the body of the guarantee was in Cinnamon's handwriting and was written before it was brought to the bank by the defendant; that the erasure of the date "15th" and putting in the "23rd" immediately above it and the last three lines of the guarantee in the words following were in the handwriting of M. Winslow, the vice-president of the bank, to wit: "This obligation and guarantee to continue in force for a period of ten days from the date hereof, and no longer. Cin., February 23, 1875."

And also gave evidence tending to show that Cinnamon was expecting

to go to New York that day, and he wanted to make arrangements to cover his business that day and make his checks good coming in, and also to carry on his business while he was gone; that the two call notes were necessary to make good his checks of the day.

The plaintiffs also gave evidence tending to show that on the 2nd day of March, 1875, at half past one o'clock p. m., the defendant gave notice of withdrawing said guarantee, and that nothing had been paid on said call notes at that time, & the same with interest thereon were then due.

The plaintiff also gave evidence tending to show that the paper was signed and left with the bank in the forenoon of the 23rd of February.

The plaintiff also gave evidence tending to show that the said advance or loan of twenty thousand dollars was made about half past two of the 23rd of February, by crediting Cinnamon with that amount and taking his notes for it between that and three o'clock by the
17 president of the bank, Mr. Harrison, and before the close of bank hours, upon the faith of the guarantee which had previously been left with the bank.

The plaintiffs also gave evidence tending to show that on the 25th of February, 1875, the defendant requested the plaintiffs to discount Cinnamon's draft on New York for $21,000, upon the faith of this guarantee, which the plaintiff declined doing; that some week or more prior to that the defendant stated to the president of the bank that he would let Cinnamon have $50,000.00 if he had it.

That prior to that the principal business of the said Cinnamon with the bank had been advancing money upon or discounting drafts drawn or bills of lading; that they had several months previously discounted one or two small bills of from $1,000 to $2,000 without bill of lading, and had discounted a note of said Cinnamon for $7,500.00 upon defendant's endorsement, which was renewed several times; all the other business with him had been by discounting his drafts with bills of lading attached; that said Cinnamon kept an account in the bank and deposited money there, and from time to time drew his checks upon the bank, which were paid, and at times small overdrafts were paid for him; that on the 24th of February, 1875, the plaintiff discounted a draft for $21,000, upon defendant's endorsement, without any bill of lading; that at that time plaintiff refused, upon the suggestion of the defendant that they had his guaranty for $50,000.00, to rely upon the guarantee as a
18 security for the discount of each note; that plaintiffs informed him that they had loaned $20,000 upon the guarantee and would loan no more upon that, and that thereupon the defendant endorsed the draft of said Cinnamon for $21,000, upon which endorsement the same was discounted by the plaintiff and placed to the credit of the said Cinnamon.

And the defendants gave evidence tending to show that the said guarantee was signed by him and delivered to the bank after 3 o'clock of Feb'y 23, 1875, and the bank business had closed; that Cinnamon said to defendant at the time the guarantee was executed in the presence of said Winslow that he was about to go East; that he had purchased produce that would go forward with bills of lading, and he would have to get the money upon drafts and get the bills of lading transferred, and that Cinnamon desired him to guarantee these transactions, and the guarantee in question was written by Cinnamon or Winslow for that purpose; that he objected to the words which are erased, "that may be due now either upon obligations now held by the bank;" that he said he did not want to be responsible for what was then due the bank, but was to guarantee his bills drawn on his shipments during his absence,

when the words were erased; that Winslow then wrote the three last lines limiting the time.

He also gave evidence tending to show that nothing was said at that time or in his presence about a guarantee being required to meet that day's business, and tending to show that nothing was said about
19 Cinnamon's checks, and nothing about discounting notes to meet the day's business, and that he had no knowledge of them, and had no knowledge of any indebtedness at the bank.

He further gave evidence tending to show that he received no consideration for the guarantee, and tending to show that the guarantee was simply to cover bills drawn on shipments in Cinnamon's absence.

He also gave evidence tending to show that the $21,000 draft endorsed by him was so endorsed to pay an amount of Cinnamon's check drawn on the First National Bank of Cincinnati, and payable to the Commercial Bank, and which the First National Bank refused to pay, and that he endorsed the draft after receiving a dispatch from Cinnamon signifying that the drawees had agreed to accept said draft, and there being no danger, he consented to endorse it. Also tending to show that about two or three days after Cinnamon left, on the 25th of February, and when the difficulty occurred about the $21,000 draft of the Commercial Bank, he informed Mr. Harrison, the president of the bank, that he did not wish the guarantee he had given for Cinnamon used any further, and some days afterwards he went to the bank and repeated the request not to use the guarantee any more, of which latter request Mr. Harrison made a memorandum.

He also offered evidence tending to show that some two weeks before the guarantee in question was signed, he and Cinnamon went to the First National Bank, where they wanted him to sign a similar
20 guarantee, and he refused to guarantee, endorse, or become responsible for Cinnamon; and that he then knew that Cinnamon wanted to borrow money of the bank; and tending to show that he did not some week or more before say to Harrison that he would give or loan Cinnamon $50,000.00 if he had it; but that he said to Harrison that he would not under any circumstances endorse or be responsible for loans from the bank to Cinnamon; and tending to show that the draft for $7,500.00 was endorsed by him for Cinnamon on the previous December, and was a renewal of a previous one of the like amount, and that at the time of the guarantee he was not acquainted with Cinnamon's transactions with the bank other than said draft and his drafts accompanying bills of lading.

He also gave evidence tending to show that he knew Cinnamon for 7 or 8 years; that he had an office in his building in the story above defendant's office; knew he kept an account with the First National Bank and drew checks upon it, and knew that he bought heavily at Cincinnati and other points; that he understood he represented and bought for Wilcox of New York, and that bills of lading accompanied his drafts; and tending to show that Harrison and Winslow so explained it to him; that he knew he was in the habit, as were other business men, of getting discounts upon bills of lading without other security; that it was a practice; that he had no personal knowledge of how Mr. Cinnamon did prior to Feb'y 23, 1875, except as he was informed by the parties.

21 He also gave evidence tending to show that he went to the First National Bank Feb'y 23, 1875, at Cinnamon's request, and did not leave his office till after 3 o'clock, and that Mr. Harrison was not in the bank; that Winslow said the guarantee was a mere form;

that if defendant did not like some of the wording of the guarantee, he would send it over to defendant and he might change it; that he did not say the guarantee was to enable Cinnamon's clerk to transact his (Cinnamon's) business during his absence; but it was said that it was to enable shipments to go thro' during Cinnamon's absence; that he did not know of any means by which his clerk could carry on his business during his absence unless his checks were met. And also tending to show that Burkhardt knew that Cinnamon did business at First National Bank, and that the guarantee was given as a security that drafts drawn on bills of lading would be promptly met; that he saw Harrison the next day, who told him that Cinnamon's clerk had drawn a check of $21,000.00 and that they had refused to pay it; that the bill of lading had gone forward on a previous day; that it was promised them or a prior transaction, and that there was difficulty about it (the $21,000 check), and suggested that defendant or Washington, Cinnamon's clerk, should telegraph about it; that the next morning Washington showed defendant a dispatch from Wilcox & Co.; that the dispatch authorized a draft on Wilcox & Co. for $21,000.00, and Harrison agreed to take the draft if he, defendant, would endorse it, which, after first refus-
22 ing, he consented to do after seeing said dispatch. And tending to show that Harrison said at the time that defendant promised to see Mr. Cinnamon's business through during his absence, and that it was desirable his credit should not be injured, which the endorsement of the $21,000 draft would avoid; that on the next day he requested Harrison that the guarantee paper should not be used in any transaction, and that Harrison assented to it.

The defendant also offered testimony tending to show that the draft of $7,500 endorsed by defendant was at 30 or 60 days, drawn in Dec., and was renewed several times before and after the guarantee; that defendants were to get a part of the money for it, but that Cinnamon kept all but $2,000 to $3,000; that it was renewed for the full amount before and after the execution of the guarantee.

The defendant also offered evidence tending to prove that on the 23rd of Feb'y, 1875, Cinnamon drew checks on the First National Bank to sundry parties, to amount of over $40,000, overdrawing his account, and that these checks were in the hands of the bank at the time of the signing and delivery of the guarantee, which was unknown to the defendant at the time, and which checks were paid from the money to Cinnamon's credit on that day, arising in part from the $20,000 placed to Cinnamon's credit upon the two call notes aforesaid, and that among these checks was one in favor of Evans, Lippincott & Cunningham for $10,997.10, which was left in the bank by Evans, Lippincott & Cunning-
ham for deposit, and which was received as a deposit, before the
23 execution and delivery of the said guarantee, and that at the time the defendant withdrew the said guarantee or notified the plaintiff that they would be no longer liable under it, there was a balance due Cinnamon on the cash account of Cinnamon in the bank, and claimed that they were entitled to have the same credited upon the two call notes, and that excluding the checks held by the bank when said guarantee was executed that Cinnamon was not indebted to the bank when the guarantee expired, and including said checks in a sum not exceeding the amount of the guaranty.

And the plaintiff in rebutting gave evidence tending to show that Cinnamon also purchased on his own account and shipped to other parties in New York besides Wilcox. They also gave evidence tending to show that the checks of Cinnamon that came into the bank on that day

were not received as deposits until after the execution of the said guarantee, and for the loan of the $20,000 due on the said two call notes, but that they were held subject to be returned unless his account was made good, and that such was the case with the check of $10,997.40 of Evans, Lippincott & Cunningham. And that there was at the time, and for a long time had been, a notorious usage in Cincinnati in receiving checks from depositors on them, and that this usage peculiarly applied to large banks like the First National, by which checks left in the bank in the morning by depositors were held until after close of bank, subject
24 to be returned in the afternoon if found upon balancing the accounts not to be good; that such had been the usage in the First National Bank since its organization in 1861, and that it was a bank of $1,500,000 capital; and that such usage was general and notorious among the customers of the bank; that it was founded upon the impossibility of examining the accounts as the checks were received, or knowing how the balance would be at the close of bank hours, and checks were received and passed to the credit of other parties by one teller, and others were drawn and paid out by another; that these tellers were in different parts of the bank; that to stop and ascertain the state of the account when checks were received would lead to great delay and inconvenience to depositors and the bank, and to great expense in managing the business of the bank and render it impossible to transact the business of large banks with many depositors. That Evans, Lippincott & Cunningham were depositors of the bank, and that the check of $10,997.00 was not received as a deposit or credit to them until after the execution of the said guarantee, and that they knew that the check would not be received as a deposit until after it was ascertained that it was good, and that such usage tended to the greater security of the bank and of its depositors, and prevented delay and confusion in the business.

And the plaintiff also gave evidence tending to show that when the check of $10,997.00 of Evans, Lippincott & Cunningham was handed in, that it was without the pass-book and was placed aside by the receiv-
25 ing teller for examination after the close of banking hours before it should be credited; that the receiving teller had been instructed by the cashier not to credit Cinnamon's account with checks left until after the close of bank hours, when the account was examined and found good; and tending to show that when the checks of Cinnamon were left on that day, the depositors were informed that they would not be passed to their credit unless found good after the close of bank hours.

The plaintiffs also gave evidence tending to show that the deposits that came in from Cinnamon on the 23rd of February and afterwards, aside from the $20,000.00 advanced him on the two call notes, was specially appropriated to uses to which they were applied.

And the defendant thereupon gave evidence tending to show that no such usage existed, and to contradict all the evidence of plaintiff in relation thereto and in reference to any notice to the depositors in regard to Cinnamon's check as testified to by pl'ff's, and tending to show that Evans, Lippincott & Co. had no knowledge or understanding in regard to said check except that it was received on deposit and as a deposit when it was left with the bank.

26 The evidence being closed the court charged the jury as follows:

This action is brought by the plaintiff against the defendant upon an alleged guaranty of the defendant to the plaintiff. The petition sets out

the incorporation of the plaintiff, the execution of the guaranty by the defendant, the loan of $20,000 upon the faith of that guaranty to one Cinnamon, the demand of the money from Cinnamon, or the notice to the guarantor, Burkhardt, of the loan, the allegation of insolvency of Cinnamon, and of demand upon Cinnamon, and non-payment.

The answer admits the organization of the bank, and sets out that the plaintiff presented to the defendant the paper of which the following is a copy:

"Whereas John Cinnamon, of Cincinnati, Ohio, is now having dealings with the First National Bank of Cincinnati, and is expected to continue such dealings, whereby sums of money are likely to become due from said John Cinnamon to said bank; now in consideration of such dealings of his with said bank, and in consideration of $1 and other valuable considerations to us moving from said First National Bank, we do hereby agree and bind ourselves to guarantee and make good to said bank any sum or sums which may become due hereafter, or which may be due now, either upon obligations now held by the bank or which may be hereafter held against said John Cinnamon, to an amount not exceeding fifty thousand dollars, and we do hereby waive notice
27 from time to time of the amount and extent of such indebtedness.

Witness our hands and seals, dated at Cincinnati this 23rd February, 1875. This obligation and guarantee to continue in force for a period of ten days from the date hereof, and no longer.

Cincinnati, Feb'y 23rd, 1875."

The defendant refused to sign the paper with the writing that follows the word "or," unless the words "or which may be due now, either upon obligations now held by the bank" were first stricken therefrom, and the word "were" erased, and the defendant then would sign the paper. The defendant alleges that the agreement was terminated on the 25th of February, by notice given by the defendant to the plaintiff at their banking house, and that nothing was due and owing from Cinnamon at the time of the termination for which defendant was liable on the guaranty. It also alleges that not until the 3rd of March did the plaintiff notify the defendant that the plaintiff had loaned Cinnamon any money on the faith of the guaranty, and that Cinnamon had refused to pay it; admits the insolvency of Cinnamon, as alleged in the petition, and denies each and every other allegation of the petition generally.

The plaintiff replies, and denies that the guaranty was withdrawn on the morning of the 25th of February, as alleged by defendant.

It devolves upon me to give you some general principles of law
28 as applicable to the facts that have been given in evidence in the case, and from these determine the rights of the parties. The guaranty is introduced in evidence, and upon the face of the guaranty there does not seem to be any ambiguity. All the terms are clear, and distinct, and expressive; but we must apply this guaranty to the subject-matter, and in applying it to the subject-matter there arises what is claimed by the parties to be an ambiguity or an uncertainty. As a general proposition of law, no oral evidence can be offered for the purpose of varying, or enlarging, or contradicting this paper, but it is a well-settled principle of law that in order to enable courts and juries to understand the contract of the parties, parol evidence is admitted for the purpose of showing the circumstances surrounding the parties at the time of the execution of the paper, and to show the condition of the business of the parties to which the paper applies. Therefore, we have

permitted evidence to be given in this case as to the nature and character of the business in which Mr. Cinnamon was engaged; we have permitted evidence to be given of the relations existing between Mr. Burkhardt and Mr. Cinnamon; of the relations existing between Mr. Cinnamon & Mr. Burkhardt and the plaintiffs. Not only is it proper that parol evidence should be permitted to go to the court and jury for the purpose of bringing before us the character of the business and the circumstances surrounding the parties at the time they entered into it, but it is also competent to receive evidence of the declarations of the
29 parties at the time of the execution of the instrument as to its purpose and its objects, for the purpose of enabling us to properly construe the instrument, giving it that force and effect which the parties themselves designed it should have. And for this purpose we have permitted evidence to be given of all that was said by Mr. Burkhardt, and all that was said by Mr. Cinnamon, and all that was said by the officers of the bank at the time of the execution of this paper, that we may be enabled to apply it properly to the subject-matter, and to give it that force and effect which, from the circumstances surrounding the parties, and their declarations at the time of its execution, it should have. With that view of it we read the paper:

"Whereas John Cinnamon, of Cincinnati, Ohio, is now having dealings with the First National Bank of Cincinnati, and is expected to continue such dealings, whereby sums of money are likely to become due from John Cinnamon to said bank, now, in consideration of such dealings of his with said bank, and in consideration of $1 and other valuable considerations to us moving from said First National Bank, we do hereby agree and bind ourselves to guarantee and make good to said bank any sum or sums which may become due hereafter, or which may be hereafter held against said John Cinnamon, to an amount not exceeding $50,000, and we do hereby waive notice from time to time of the amount and extent of such indebtedness.

30 "Witness our hands and seals, dated at Cincinnati this 23d day of February, 1875. This obligation and guarantee to continue in force for a period of ten days from the date hereof, and no longer.

"Cincinnati, February 23rd, 1875.

(Signed) "BURKHARDT & CO."

It is claimed by the defendant that, taking the facts and circumstances in the case, taking the declarations of the parties at the time of the execution of this instrument in connection with it, it is clear that the obligation assumed by him was a responsibility only for such indebtedness as should accrue to the bank from Cinnamon after the execution of this paper, growing out of drafts drawn accompanied by bills of lading, or to which, or with which, bills of lading were promised in the future. That is the claim of the defendant. The claim of the plaintiff is, that, from the evidence in the case, applying it to this instrument, that this language embraced all the transactions which the parties should have, and which they should continue to have, as connected with the general business of Mr. Cinnamon; that, as connected with this particular business of Mr. Cinnamon, *that* it embraced a loan which they claim is the loan for which this suit is brought, which they say was a part of the business connected with this general business, growing out of it; and that it was in the contemplation of the parties at the time they signed this paper. These are the claims of the parties. Applying it generally to the business of the plaintiff, it would embrace undoubtedly and cover
31 the transaction in controversy, to wit, this loan evidenced by call

notes. If that were a part and parcel of the general business of the party, as transacted at that time, and shortly before that period, and the loan was without any proviso, the bank would not be under obligations to see to the application of the money arising from the discounts of these notes. The money might be appropriated by Cinnamon to whosoever he pleased to appropriate it, subject to the exception which I shall give you directly; that is, the general right of the parties under this. It could be paid by Cinnamon to anybody outside of the bank; if the loan was made after the execution of the paper, the debt became due to the bank, and is covered by the guaranty. They were under no obligations to see to the appropriation of this money. Cinnamon could pay it to whosoever he pleased upon debts he owed before that time. But there is a limitation in this guarantee, that the guarantor should be liable only for such debts as became due after the execution of the guaranty, and which might be held after the execution of the guaranty.

Now, as particularly applicable to this case. I must allude to the claim of facts by the defendant and by the plaintiff. Admitting the loan, the defendant says that it was simply an appropriation of the credit of the defendant upon the guaranty to the payment of the debt of Cinnamon which then existed to the bank. If this is so, the plaintiff has no right to a recovery, for, although it may have been in the form of a
32 loan, may have assumed that shape, yet in fact it was simply a transfer of the credit which the bank had given to Cinnamon to the credit of the defendant Burkhardt. Upon this guaranty there could be no recovery under this guaranty upon an action of that character; for it is certain, according to the terms of this guaranty, and rendered much more definite and pointed from the fact that the guaranty originally included the debts that were then due, as well as those which were to became due thereafter, that the defendant did not intend in this guaranty to bind himself in any way for the debts which were then due to the bank.

Applying these principles to what is claimed to be the facts in the case, the plaintiff claims that this guaranty was executed at a particular time; the defendant claims that it was executed at a time different from that claimed by the plaintiff. The defendant claims that at the execution of this guaranty this debt had become due from Cinnamon to the bank, first upon the check of Evans, Lippincott & Co., which they claim was deposited in the bank, drawn by Cinnamon in favor of Evans, Lippincott & Co. upon the bank, deposited with the bank and received by them before the signing of this paper, and that the remaining amount of $20,000 was also a debt due the bank, or held by them in the shape of drafts or checks coming to them through the clearing house, at the time the guaranty was executed. The plaintiff, in reply, says:
33 First. That none of these drafts were held by it at the time of the execution of this paper. If they were not so, that ends that branch of the case; for if these drafts were not debts at the time against Cinnamon, and were not in fact in the possession of the bank at the time of the signing of this paper, they could not be debts in favor of the bank against Cinnamon; although they may have come in ten minutes or five minutes after the signing of the paper, they were not debts against him at the time of the execution of the paper. They say, in addition to that, that if the jury should be of the opinion that the drafts, or any one of them, were in their possession before the execution of the guaranty, that they were held by them conditionally; that they were not a debt against Cinnamon, and did not become a debt against

Cinnamon, until after the paper was executed. If that were so, it would not be a debt then due the bank within the contemplation of the guaranty.

It is claimed that one of the checks, as I observed before, the one from Evans, Lippincott & Co., was brought in by Evans of that firm and deposited. Other checks, making up the $20,000, came to the bank from the clearing house, and this brings me to the principle of law in regard to the check of Evans, Lippincott & Co. It is said by the plaintiff, by way of proof, that although there was no express agreement between Evans, Lippincott & Co., the depositors of this check, and the bank, that it should be returned in case it should not be found good at three o'clock, or shortly thereafter, yet that there was a general
34 usage among bankers of the city of Cincinnati of that character which extended to all their customers, and therefore it had become a law. The question of usage as presented here is undoubtedly a very important question, and as a general proposition of law every commercial contract is entered into with the understanding that the usage in regard to the particular matter of the contract becomes a part and parcel of the contract itself. But that is not of this character, as I can see. I take it to be the settled law of the land that when a check drawn by a depositor of a bank in favor of another depositor of the bank, or, to express it more clearly, I will get words to suit my idea a little better—whenever a check is drawn upon a bank by a depositor of that bank, and the check is deposited with the bank by the person in whose favor it is drawn, and is accepted by the bank as a deposit, the bank becomes indebted to the depositor for its amount, and it becomes a debt from that moment between the depositor and the bank—a debt from the bank to the depositor depositing it, and becomes a debt to the bank from the drawer of the check. This general proposition of law, I think, is recognized in the case of Addie vs. National Bank, city of New York, 45 New York, 735, and by the Supreme Court of the United States in Thompson vs. Riggs, 5th of Wallace, 663. That being the principle of law, how far shall it be controlled by a usage which may be in contravention to it? In reference to the doctrine of usage, as to when and how it should be applied, Greenleaf, in the second volume of his
35 work on evidence, pp. 251, marginal page, says: "These usages, many judges are of opinion, should be sparingly adopted by the courts as rules of law, as they are often founded in mere mistake, or in the want of enlarged and comprehensive views of the full bearing of principles. Their true office is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulation, but from mere implications and presumptions and acts of a doubtful and equivocal character; and to fix and explain the meaning of words and expression of doubtful or various senses. On this principle, the usage or habit of trade or conduct of an individual, which is known to the person who deals with him, may be given in evidence to prove what was the contract between them."

And Justice Story, in the schooner Reeside, 2nd of Sumner, 569, says: "I own myself no friend to the almost indiscriminate habit of late years of setting up particular usages or customs in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law as well as under the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misin-

terpretations and abuses, to outweigh the well known and well-
36 settled principles of law, and I rejoice to find that of late years the courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs and to discontinue any further extension of them. The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, a fortiori, not in order to contradict them. An express contract of the parties is always admissible to supersede or vary or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would not only be to admit parole evidence to control, vary, or contradict written contracts, but it would be to allow mere presumption and implications properly arising in the absence of any positive expressions of intention to control, vary, or contradict the most formal and
37 deliberate written declarations of the parties."

Now, taking these general rules, clearly as I find them expressed, how could the application of this usage, suppose it were established, tend to illustrate anything that there is in this case? If the law fixed the act of depositing a check upon the bank, and the acceptance by the bank of that check, as creating an indebtedness from the bank to the depositor, and creating an indebtedness from the person who has originally drawn the draft on the bank, there is nothing to explain in that—nothing undetermined and nothing indefinite. And taking that as a general rule, has the force and effect of it been modified by any contract or arrangement between the parties? Has it been show' that there was either a general contract between the depositor and the bank, or that there was a special contract between them; that these deposits should not be considered as credited to the depositor or as charged against the bank until they had fully investigated and examined it, or that they should hold it until three o'clock? If so, that might control the general rule. It is said, however, that it is difficult to apply this general principle to institutions of large business, and this difficulty I concede does exist—of seeing at once the state of the account of each person drawing checks. All that can be avoided, however, by making an arrangement with the depositor, that it shall not be considered a credit to him until the hour of three o'clock. Several of the witnesses said they always made that arrangement with their depositors.
38 But in regard to this custom, if a custom of that kind were permitted to obtain, it should be a custom applicable to all banks in the city of the same character, and not to that of a certain extent of business—to all banks of the character of this bank. For if you were to draw a line between large banks and small banks, it would be very difficult to say exactly where that line should be. Suppose, for instance, a bank of a capital of $1,500,000, and another of $1,000,000, and another of $800,000 or $500,000, and another of $2,000,000, which one of these banks is to be classed among "small banks," and which among "large

banks"? A custom, in order to make it good, must be applicable to all the banks or all the mercantile houses of the character of the business they transact and are engaged in—with reference to the character of the business they do, and the responsibility of checks upon themselves by depositors, whether it be large amounts or small ones. If there were banks of a different character who did no business of this kind, then it may be well said to be a good custom, although it does not embrace such, but it must embrace all banks who do the particular kind of business to which the custom may be applied, without reference to its extent. I think the doctrine of the law is recognized by all the authorities. I shall not stop now to give them, but I refer to a note in 1st Greenleaf, 334: "The usage must be general in the whole city or place, or among all persons in the trade, and not the usage of a particular class only, or the course of practice in a particular office or bank, to whom or which the party is a stranger." (Gabay v. Lloyd, 3 B. & C., 793.")

But I take the general doctrine to be as I have announced it. The usage, in order to make it good, must apply to all banks of the character and business I was speaking of. If the usage be admitted as claimed, if it did not embrace all the banks of the character of the plaintiff's in Cincinnati, it must be rejected in any view of the case. Applying the principle of law which I have given to the check of Evans, Lippincott & Co., if the jury find that the check was received upon deposit by the bank—accepted by them as a deposit—without any understanding between the parties—that is, between the depositor and the bank—that they should hold it until three o'clock, it became a debt due from the bank to the depositor, and it became a debt due the bank from Cinnamon; and if the guaranty was made afterwards, it would not be included within it. But if they find that it was not received as a deposit by the bank from Evans & Co., but to be passed into the bank for the purpose of being examined and investigated, to see whether or not it was good before it was credited to them, so understood by Evans and the bank, then it would not be a debt until after the examination had taken place and the credit made to the party, and would be within the guaranty. As to the checks coming to the bank through the clearing-house, they occupy an entirely different position if, according to the custom, rules, and regulations of the clearing-house, the checks drawn upon this bank and passing through the clearing-house were sent to them for examination and investigation. If, according to the rules of the clearing-house, they have until four o'clock to which, or until four o'clock in which, to make the examination of the condition of the accounts of the depositors drawing the checks and the character of the checks themselves, they have this time to determine whether they are good or bad, and they do not become a debt against the bank as soon as they are received by the bank. When they have made a full and complete examination and investigation of the condition of accounts of the drawer, and when they have done that, then it is for them to give the credit. And if they are not in such a condition between the hours that they receive them and four o'clock, it is their duty to return them, and it is their privilege to do so. Now, if these drafts were received by the bank after the execution of the paper, no question can arise in regard to their being debts created after the execution of the paper, and it is for the jury to determine whether they were so received. If they had been received in fact before, they were not a debt until they were made so by an examination of the accounts,

or the making of the amount good by the person who had drawn the check after the time they had received it; and if that was not done until after the guaranty was signed, they would be within the guaranty; if that were done before and the credit given before that time,
41 then they would not come within the term of the guaranty. If it were done afterwards—the making good of these checks by filling bills of lading—and they received them afterwards, and it became a debt in that way, then they would come within the terms of the guaranty.

I think I have given you, gentlemen of the jury, all the principles of law which will aid you in relation to the facts of the case. I think you will have no difficulty in applying them; and they embrace all, with the exception of one or two items which I shall allude to in a moment.

I believe I already spoke of the fact that if this loan was in the contemplation of the parties at the time that this paper was executed; if it was for the purpose of securing the loan, and was so understood by Mr. Burkhardt at the time that he executed this paper, then the loan itself would come within the character of business which is embraced within the terms of this guaranty as business which was then being transacted between them, and would be within the guaranty. If there was any money in the hands of the bank which was not raised for an express purpose, and not appropriated by the party, the bank could have taken that money and paid off Lippincott's check; if the money was raised by Cinnamon for a particular purpose and appropriated by him, they *they* could not use it in payment of the check.

And the counsel for the plaintiff excepted to so much of said
42 charge as relates to depositing checks drawn upon the bank and to the usage as to the same; and also to so much thereof as states the rules under which the bank became the debtor of a party depositing or leaving a check with it.

And the plaintiff asked the court to charge the jury as follows:

"CHARGE 4.—If the check of Cinnamon in favor of Evans, Lippincott & Cunningham, for $10,997.10, was simply handed into the First National Bank, either to the receiving teller or the cashier, without the pass-book, to be examined and passed as a deposit, after bank hours, and it was placed away for that purpose, and was not examined or passed upon, or placed to the credit of Evans, Lippincott & Cunningham, or received as a deposit until after banking hours, then it did not become a debt as between Cinnamon and the bank until after it was so passed upon."

Which charge the court gave.

The plaintiff also asked the court to charge the jury as follows:

"CHARGE 5.—That if checks of John Cinnamon on the bank were left at the bank on the 23rd of February, 1875, but were not passed upon by the receiving teller, or received as a deposit, nor entered in any pass-book, or other book of the bank, to the credit of the parties leaving them, but were laid aside for examination until after bank hours, when an examination could be made to see whether Cinnamon's account was good, then they did not become a debt of Cinnamon to the bank
43 until they were so passed upon and entered."

This charge the court gave, adding: "If it was handed n asi a deposit, it became a deposit at the time it was received. Taking the surrounding circumstances into consideration, if it was received by the teller as a deposit, it became a deposit. That I give you, for it has these words in it, 'or received as a deposit.'"

To which addition to the charge as asked, and refused to give it in

the words asked, the counsel for the plaintiff excepted, and his exceptions were allowed and made part of the record.

And the plaintiff's counsel asked the court to charge the jury:

"CHARGE 6.—If the receiving teller of the First National Bank had received instructions from the proper officers of the bank not to receive Cinnamon's checks on deposit, or credit them to parties presenting them, until they were ascertained to be good after close of bank hours, when the accounts were passed upon, and the receiving teller did not receive them as a deposit, pass upon them, or enter them to the credit of the parties, but, as they were handed in, placed them aside for examination, and to pass upon them afterwards, then such checks did not become a debt as between Cinnamon and the bank until they had been thus examined and passed upon."

Which the court refused to give as asked, but gave with the following qualification: "If he leaves the check as a deposit, without
44 any conditions, it becomes a deposit at once. I would give that with the conditions that it was so understood by the depositor, that it was so received at the time of deposit."

To which refusal to give said charge as asked, and to the giving of the same with said qualification, the plaintiff excepted, and his exception was allowed and made part of the record.

And the counsel for plaintiff asked the court to charge the jury:

"CHARGE 7.—That if at the First National Bank there had been for a long time a usage by which the receiving teller entered checks drawn on the bank in the pass-book of the depositor as they came in, subject to a return of the checks to the depositors if, in the afternoon of the day when the accounts were examined, the checks were found not to be good, and to return the same to the party depositing them, and such were then made good by the depositor; and if such usage tended greatly to facilitate the business of the bank and of the depositor, and of economy of money in the management of the bank and of time to the depositors, tended to prevent inconvenience and confusion at the bank and give greater security to the bank and depositors, and if such usage was notorious among the customers of the bank, then such usage would be a valid and legal usage as between the depositors and the bank."

And the court refused to give said charge as saked, but quali-
45 fied, as follows: "Nothing in this case shows that Mr. Evans knew anything about this usage. As to the question of general use, I have said that it was not competent to change the law in the case, when the deposit was made without anything said about the deposit by the persons receiving the deposit; the law made that a debt against the bank in favor of the depositor; but if the depositor knows the usage in cases of that kind, why, as a matter of course, it will change it. With reference to this portion of it—charge of counsel—I mean, gentlemen of the jury, you should not permit your minds to be diverted from the true issues of this case by the numerous instructions which have been given or refused. Sometimes the court may give so many instructions as that it would have a tendency to confuse the jury, or may give them so indefinitely and so generally as not to be understood well by the jury, and the instructions refused and the instructions given upon asking of counsel may have the same tendency; but you should keep in mind as clearly as you possibly can the principles which have been given you by the court in the general charge. It is for you to determine in this case what was embraced within the guarantee, as I have defined it to you, and as I have applied it, and it is for you to

determine the great and important fact in the case when this guarantee was signed; if signed before these checks were received—any of them—then there is no question about it; if signed after the checks were received—any one of them—it is for you to examine into the testi-
46 mony and ascertain in what way the checks were received, and bearing in mind the rights of the parties holding the checks, as defined to you by the court, particularly those coming from the clearing-house, applying the testimony as to the question of time, and determine whether or not it was signed before or after the reception of these checks or at what stage of progress, and to examine or investigate what the checks were which had come from the clearing-house."

To which refusal to give said charge as asked, and to the giving of the same as qualified and given, the counsel for the plaintiff excepted, and his exception was allowed, and made part of the record.

In testimony whereof the court has signed, sealed, and allowed this bill of exceptions, and ordered it to be made a part of the record in this case.

PHILIP B. SWING, [SEAL.]
U. S. District Judge, S. D. O.,
Holding the Circuit Court for said District.

47 And afterwards, to wit, on the twenty-ninth day of June, in the year last aforesaid, an entry was made upon the journal of said court in said cause clothed in the words and figures following, to wit:

Journal entry.—Judgment.

THE FIRST NATIONAL BANK OF CINCINNATI, Ohio,
vs.
FREDERICK BURKHARDT.
} Money. Judgment.

This day this case came on to be heard upon the motion of the plaintiff for a new trial, and was argued by counsel and submitted; on consideration whereof the court overrules said motion. It is therefore considered and adjudged that the plaintiff recover of the said defendant the said sum of nine thousand three hundred and three dollars and seventeen cents, with interest thereon from the 3rd day of October, 1876, and also its costs herein expended, taxed at $, and execution is awarded therefor.

And afterwards, to wit, on the twenty-first day of September, in the year eighteen hundred and seventy-seven, came the said plaintiff, and filed in the clerk's office of the said court its certain error bond in said cause, clothed in the words and figures following, to wit:

Error bond.

Know all men by these presents that I, L. B. Harrison, of the
48 county of Hamilton, State of Ohio, am held and firmly bound unto Frederick Burkhardt in the sum of five hundred dollars, to be paid to the said Frederick Burkhardt, his heirs, administrators, or assigns, for the payment of which, well and truly to be made, I do hereby bind myself, my heirs, executors, and administrators, by these presents, sealed and dated this twenty-first day of September, A. D. 1877.

The condition of this obligation is such that whereas lately in the circuit court of the United States for the southern district of Ohio, in a suit depending in said court between the First National Bank of Cincinnati as plaintiff, and Frederick Burkhardt as defendant, being case No. 2129, a judgment was rendered against the said defendant and in favor of said plaintiff for the sum of $9,303.17, and interest and costs, from which judgment the said plaintiff obtained the allowance of a writ of error to the Supreme Court of the United States.

Now, therefore, if the said plaintiff shall prosecute his said writ of error to effect and pay all costs which shall be awarded in case said judgment shall be affirmed by said Supreme Court, then this obligation shall be void, otherwise to be and remain in full force and virtue.

L. B. HARRISON. [SEAL.]

Signed, sealed, and acknowledged in presence of—
T. D. LINCOLN.

Bond and surety approved.

P. B. SWING, *Judge.*

49 UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, Thomas Ambrose, clerk of the circuit court of the United States for the southern district of Ohio, hereby certify the foregoing to be a true and correct transcript of the record and proceedings in the case of The First National Bank of Cincinnati vs. Frederick Burkhardt, as the same are kept in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Cincinnati, this 22nd day of September, A. D. 1877, and in the 102nd year of the Independence of the United States of America.

Attest:
[SEAL.]

THOS. AMBROSE,
Clerk U. S. Circuit Court S. D. O.

50 *Assignment of errors.*

The Supreme Court of the United States.

THE FIRST NATIONAL BANK OF CINCINNATI
vs.
FRED'RICK BURKHARDT. } Case No.

Now comes The First National Bank of Cincinnati, plaintiff in
51 error, by its counsel, Lincoln, Smith & Stephens, and says: That there was error in the foregoing record and proceedings of the circuit court in this, to wit:

First. The court erred in its general charge, and especially in the following particulars:

1st. In so much of said general charge as relates to depositing cheques drawn upon said bank, and in relation to the usage relating to such deposits.

2nd. In so much of said general charge as states the rule under which the bank became the debtor of the party depositing or leaving a cheque with it.

Second. In refusing to give charges as asked by plaintiff's counsel, viz:

1st. In refusing to give the fifth charge asked by the plaintiff as asked, and in adding to and in qualifying the same, and to such qualification.

2nd. In refusing to give the sixth charge asked by the plaintiff as asked, and in adding to and in qualifying the same, and to such qualification.

3rd. In refusing to give the seventh charge asked by the plaint-
52 iff, and in adding to and in qualifying the same, and especially in so much of the qualification as held that the depositor at the bank was not bound by a well-established and notorious usage of the bank of the character set out in said seventh charge, unless it were shown that such depositor had knowledge of such usage, and also especially to so much of said qualification as held that unless the depositor had knowledge of the usage the deposit would become a debt as between him and the bank notwithstanding such usage.

And the said First National Bank of Cincinnati prays that for and on account of the said errors so as aforesaid assigned, and of other errors manifest in the record and proceedings of said circuit court, the said judgement may be reversed with costs.

LINCOLN, SMITH & STEPHENS,
Attorneys for the First National Bank of Cincinnati.

53 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit court before you, between the First National Bank of Cincinnati and Frederick Burkhardt, a manifest error hath happened to the great damage of the First National Bank of Cincinnati, plaintiff, as by its complaint appears. We being willing that the error, if any hath been, should be duly corrected, and fully and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct said error, what of right and according to
54 the law and customs of the United States should be done.

Witness the Hon. M. R. Waite, Chief Justice of the said Supreme Court, the second Monday of October, A. D. 1876.

[SEAL.] THOS. AMBROSE,
Clerk of the Circuit Court for the Southern District of Ohio.

55 UNITED STATES OF AMERICA, *ss:*

To Frederick Burkhardt, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein the First National Bank of Cincinnati is plaintiff, and you are defendant in error, to show cause, if any there be, why the

judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. M. R. Waite, Chief Justice of the said Supreme Court of the United States, this 22d day of September, A. D. 1877.

PHILIP B. SWING,
Judge of the District Court of the United States for the said District, no Associate Justice or Circuit Judge being present.

56 Service of within citation accepted and acknowledged this 25th day of September, 1877.

FRED'K BURCKHARDT.
By SAGE & HINKLE,
Of Counsel.

(Indorsement on cover:) No. 234. The First National Bank of Cincinnati, plaintiff in error, vs. Frederick Burkhardt. S. Ohio C. C. U. S. Filed 6th October, 1877.

OFFICE SUPREME COURT U. S.
FILED
MAR 22 1880
D. W. MIDDLETON, Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1879.

First National Bank of Cincinnati,

234 VS.

Frederick Burkhardt.

Error to the Circuit Court of the United States for the Sixth Circuit sitting in the Southern District of Ohio.

T. D. LINCOLN,

Of Counsel for Plaintiff.

Supreme Court of the United States,

OCTOBER TERM, 1879.

First National Bank of Cincinnati,

234 VS.

Frederick Burkhardt.

Error to the Circuit Court of the United States for the Sixth Circuit sitting in the Southern District of Ohio.

I.

STATEMENT OF FACTS.

This suit was brought upon the following instrument:

"Whereas, John Cinnamon, of Cincinnati, Ohio, is now having dealings with the First National Bank of Cincinnati, and is expected to continue such dealings, whereby sums of money are likely to become due from said John Cinnamon to said Bank; now, in consideration of such dealings of his with said Bank, and in consideration of one dollar and other valuable considerations to us moving from said First National Bank, we do agree, and hereby bind ourselves to guarantee and make good to said Bank any sum or sums which may be hereafter held against said John Cinnamon, to an amount not exceeding fifty thousand dollars; and we do hereby waive notice from time to time of the amount and extent of such indebtedness."

"Witness our hands and seals, dated at Cincinnati, this 23rd day of February, 1875."

"This agreement to continue in force for a period of ten days from date hereof, and no longer.

Cincinnati, February 23, 1875. BURKHARDT & Co."

John Cinnamon, named in said guaranty, was borrowing money of the Bank and keeping an account therewith, and was desirous of obtaining larger loans of the Bank, which were refused, without security. He thereupon procured Frederick Burkhardt, under the name of Burkhardt & Co., to give the above guaranty to the Bank.

He was about to leave for New York, and to make good his checks on the Bank, on the same day he obtained a loan of $20,000. upon this guaranty, for which he gave two call loan notes of $10.000. each.

The defendant at the time claimed that the guaranty was only intended to guarantee transactions upon bills of lading—where Cinnamon had drawn, with bills of lading attached and negotiated the drafts at the Bank; and to establish this point, he was permitted to give parol evidence of what took place and was said before and at the time the contract was executed.

In order to reduce the amount of $20,000, passed to the credit of Cinnamon and for which he gave these two call loan notes, then held by the bank, defendant endeavored to show that on the day these call loan notes were given and before they were in fact given, Cinnamon had given Evans, Lippincott and Cunningham, a check drawn upon the plaintiff for $10,997.10; that the check was left with the bank as a deposit by Evans, Lippincott and Cunningham before the giving the guaranty, and was therefore a debt due from Cinnamon to

the plaintiff, and that the plaintiff could not use the money credited him on the call loan notes to satisfy this check.

The court charged that if the check of Evans, Lippincott and Cunningham was left with the receiving teller of the bank as a deposit, before the giving of the guaranty, that it became a debt to the bank from Cinnamon, unless the bank gave notice that it was subject to an examination of the account; and that the bank could not charge the same against the money to his credit by the call loans.

It was shown to be difficult, if not impossible for a bank to know what of the checks drawn upon it would not be paid by deposits of money during the day, or the state of the account between it and its depositors, until at the close of the day's business. Where a bank has many depositors, it is practically impossible to know this, as the deposits are made.

The verdict of the jury was made up by deducting this Evans, Lippincott and Cunningham check from the two call loans the bank made Cinnamon.

It is important, therefore, for this Court to clearly understand the action of the Circuit Court in reference to this check.

The court charged, that if the receiving teller received it at all—no matter what he did with it, there being no notice at the time that it was to be held for an examination of Cinnamon's account, and no agreement to that effect with Evans, Lippincott & Cunningham, that the check left by them would take that course—that it became a deposit from the time it was so left, no matter what was done with it—irrespective of any usage there might be about it. The court says:

"If it was handed in as a deposit, it became a deposit

from the time it was received. Taking the surrounding circumstances into consideration, if it was received by the teller as a deposit, it became a deposit." *Qualification of charge* 5, *printed record, page* 18.

In qualification of charge 6, the court says:

"If he leaves the check as a deposit without any condition, it becomes a deposit at once." *Printed record, p.* 19.

To understand this, the Court will bear in mind, that when the check was handed in to the Bank, it was without the pass-book and was placed aside by the receiving teller for examination after close of banking hours, before it should be credited, "in accordance with usage and previous instructions." *Printed record, p.* 11.

The testimony tended to show, that for a long time there had been a general usage in the banks of Cincinnati, to receive and enter checks in the pass books as they came in, subject to examination after close of bank hours to see that the accounts were good; that this had long been the usage of the First National Bank; that this usage grew out of the difficulty of ascertaining the state of the account before the close of bank hours, and tended greatly to the economy, security and protection of the depositor and the bank; and it was claimed that such usage was valid and controlled the check of Evans, Lippincott & Cunningham. The court charged against this view.

This statement will enable the Court to understand the various questions raised in the record.

II.

THE COURT ERRED IN ITS CHARGE THAT THIS CHECK, IF LEFT AT THE BANK BEFORE THE GUARANTY WAS SIGNED, SHOULD BE DEDUCTED FROM THE TWO CALL LOANS.

The two call loans of $10,000. each having been made under the guaranty, they were a debt due *thereafter.* And how were they subject to a deduction of the Evans, Lippincott and Cunningham check?

The very object of the guaranty was to keep Cinnamon's account good, that his business might go on while he was absent—in other words, to meet his checks as they might come in or remain unpaid. And surely this very check, being afterwards held in bank as a claim against Cinnamon, it falls under the express words of the guaranty:

"We do hereby agree and bind ourselves to guarantee and make good to said bank any sum or sums which may become due hereafter, *or which may be hereafter held against John Cinnamon.*"

Now, the two call notes of $10,000. each, were *held* against him, and if the check of Evans, Lippincott & Cunningham was not paid, that was *thereafter held* against him. How then could that be deducted from the amount of the $20,000. covered by the call loans?

A bank never knows, and this record shows that it is difficult to ascertain until the close of the business of the day, whether a depositor is indebted to it or not. Judge Swing alludes to this difficulty. *Printed Record, p.* 16.

As the sums come in and are paid to the receiving teller,

and as they are paid out by the paying teller, officers standing in different positions in the bank, it cannot be told how a man's account stands at any time without stopping the business of the bank for at least ten or fifteen minutes; and in a bank of many depositors, it is practically impossible to ascertain the state of the accounts. Now, then, does not this check fairly fall under the words and meaning of this guaranty?

Mercantile guaranties are not construed narrowly but liberally, to accomplish the purposes for which they were given.

Bell v. *Bruen*, 1 How., 186.

Bailey et al v. *Larcher.*, 5 R. I. R. 534.

Mr. Justice Strong, refers to this in a late case. He says:

"It is manifestly impossible for the officers of the bank to keep ever in memory the state of each depositor's account," 52 *Penn. St. R.* 534.

And what is there that authorized the court to have this check of Evans, Lippincott and Cunningham deducted from these call loans. They certainly were debts afterwards contracted, and even this check was a debt *held* by the bank against Cinnamon after the execution of the guaranty.

It was ascertained to be such debt after the close of the business of the day and was thereafter held as such.

We claim that it comes within the words and meaning of the guaranty.

III.

THE COURT ERRED IN REFERENCE TO THE TIME AND CIRCUMSTANCE WHEN THIS CHECK BECAME A DEBT FROM CINNAMON TO THE BANK.

In order to understand this matter, the Court must carefully observe the course of the trial. There was evidence tending to show that when this check was left with the bank, the pass-book was not presented, and the receiving teller took it, laid it on one side for examination after bank hours, and that no entry or credit of it was made until after this time. *Printed record, p.* 11.

Now, it is the handing in of this check in this way that the court charged that if so left as a deposit it *eo instanti* created a debt of Cinnamon to the bank, irrespective of what was done with it, or of any usage or custom relating thereto.

The court charged that if the check was handed to the paying teller as a deposit, it at once became a debt, whether received or acted upon or not.

"If it was handed in as a deposit, it became a deposit at the time it was received." *Answer to charge* 5, *printed record, page* 18.

"If he leaves the check as a deposit, without any conditions, it becomes a deposit at once." *Answer to charge* 6, *printed record, page* 19.

Upon this subject there was evidence of a general usage of the banks of Cincinnati, to take checks as they are handed in, enter them to the credit of the parties in the pass-books, subject to be returned if, at the end of the day's business, such checks were ascertained to be not good; that such usage was

general and notorious among the customers of the bank, that it was founded upon the impossibility of examining the accounts as the checks were received or knowing how the balance would be at the close of the bank hours, and that checks were received and passed to the credit of the party by one teller, and others were drawn and paid out by another; that these tellers were in different parts of the bank; that to stop and ascertain the state of the account when checks were received, would lead to great confusion, delay and inconvenience to depositors and the bank and to great expense in managing the business of the bank, and render it impossible to transact the business of larger banks with many depositors." *Printed record, page* 11.

The court decided against such general usage, upon the ground that it contradicted a well known rule of law. *Printed record, pp.* 15, 16, 17, 18.

It is denied, that there is any fixed rule of law applicable to this case and which should exclude the proof of the usage in question.

The court based its action upon the cases of *Riggs* v. *Thompson*, 6 Wall., 679, 680; and upon *Oddie* v. *National City Bank of New York*, 45 N. Y. R., 741.

The case of *Thompson* v. *Riggs*, does not control this point or present the question contested in this case.

In that case it was clearly established that the deposit was made and that the money sued for had long been due from the bank to Thompson. After the deposit was made, and the debt therefor contracted, the law making United States' notes a legal tender for all debts was passed, and the question made in the case was this:—could the plaintiff, by proof of

usage existing at the time the debt was created, defeat the operation of the legal tender provision. The court held it could not, saying:

"Usage contrary to law, or inconsistent with the contract, is never permitted to control the general rules of law, or the real intent and meaning of the parties." 5 *Wall.*, 580.

No such question was made in this case; there was no dispute as to the debt itself in that case; the question here was, when did the deposit become complete, and whether a well known usage could not be received to affect this question.

The court held that if Evans, Lippincott & Cunningham left the check at the bank as a deposit, and the teller laid it aside without acting upon it or crediting it, without saying anything, it became a completed deposit and a debt from Cinnamon to the bank from that moment; whereas, we claimed that there was a reasonable usage competent to be considered as affecting this question. Clearly the case of *Thompson* v. *Riggs* does not touch this case.

The case of *Oddie* v. *The National City Bank of New York*, 45 N. Y. R., 741, does not help the defendant; on the contrary it aids the plaintiff.

In that case, the plaintiff left a deposit ticket and his pass book at the bank, and from time to time sent in other deposits which the bank entered on the deposit ticket. About two o'clock of the same day, the plaintiff sent in two checks for $18,237.50, one made by Frank Work & Co., and one by Davis & Aiken. The check of Davis & Aiken was drawn on the bank. It was payable to the order of the plaintiff and by him endorsed. The assistant of the receiving teller put a stamp on the back of this check certifying to the correctness

of the indorsement. The account of Davis & Aiken with the bank was largely overdrawn when the check in question was left, and such fact was known to the officers of the bank, but they nevertheless continued to certify the checks of that firm as good to a time after the check in question was deposited.

There was no evidence of any usage affecting the question of the absolute deposit, or of a return of the check if not found good, and the case, therefore, is not authority excluding such usage. The court say:

"Financial business is transacted at banks in large amounts, with great rapidity, *but according to definite and certain rules which are well understood and acted upon* by those engaged in that business. Very *little is said, but very much is understood;* and there is an absence of all formalities which tend to embarrass the facility of doing the business.

In determining the legal effect of such transactions, we must apply the same rules applicable to all contracts and business affairs, and effectuate and carry out the intention of the parties to be gathered from their acts and declarations, *and the accustomed and understood course of the particular business.*" 45 *N. Y. R.*, 741.

In other words, according to the usages that prevail in reference to the particular business. Surely, the usage proven was a reasonable one, tended to protect both parties and to economy in doing business at banks, and ought to prevail. It established the honest thing to be done between the parties and could work no wrong to any one, and there is no rule of law to prevent its operation in the way contended for. It is a usage relating to the mode of doing a given thing and showing when it is completed.

It is an assumption to say that it is contrary to a rule of

law upon the subject, for the rule contended for does not operate until the deposit is final and complete. This statement begs the whole question.

Speaking of the passage of Mr. Justice Story in *The Reside*, quoted by Judge Swing as to the introduction of usage in evidence, JUDGE LOWELL in *Swift* v. *Gifford*, says:

"Many similar remarks of eminent judges might be cited. But in the application of these general views, it will be found difficult to ascertain what is considered a principle of law that cannot be interfered with. Principles of law differ in their importance as well as in their origin, and while some of them represent great rules of policy, and are beyond the reach of convention, others may be changed by parties who choose to contract upon a different footing, *and some of them may be varied by usage*, which, if general and long established, is equivalent to a contract. Thus is *Wigglesworth* v. *Dallison*, Doug. 201, which Mr. Smith has selected as a leading case, the law gave the crops of an outgoing tenant to his landlord; but the custom which made them the property of the tenant was held to be valid." 2 *Low*, 113.

This case related to the whale fishery and is interesting. It discriminates well upon the subject, in a point touching the matter in issue in the case before the court. Upon this point see also *Wigglesworth* v *Dallison*, Doug. 201; *Clark* v *Baker*, 11 *Met.* 189.

In the case of *Clark* v. *Baker*, it was held that a usage providing that upon a sale of grain the vendee might hold all the grain that came up to the warranty, refuse to take the balance and sue for the money paid thereon, or for a breach of the warranty without returning the grain which was equal to the warranty. The court say:

"The usages found by the jury goes directly to estab-

lish a rule in contravention of the common law in relation to rescinding a contract in case of sale of an unsound article, accompanied by warranty or induced by false representations. The general rule of law requires the vendee, if he would rescind the sale for such cause, to restore the entire commodity purchased. The local usage proved is, that in a sale of corn under like circumstances, the party may keep so much of the commodity as answers the warranty or representation, and decline taking the residue; that is, he may rescind the contract in part, and without returning the corn he has received, may recover back the money paid for so much of the article as does not answer the representation. The usage is certainly not an unreasonable one and not to be rejected upon that ground." * * * * * * * *

"Without any disposition on the part of the court to extend the doctrine of local usages beyond the adjudicated cases, yet we have not felt authorized to reject the evidence offered in the present case." 11 *Met.* 189, 190.

There is no little confusion in the books upon this point. There are many decisions in which it is stated generally, that no usage can be given in evidence which contravenes a rule of law. While this is true, there are many rules of law which are but usages adopted by the courts because they were such; and there are very many cases where what had previously been regarded as rules of law have been changed or modified by local usage. Much discrimination is therefore required upon this subject.

M. DUER says:

"*The usage*, as the rule is commonly expressed, *must be consistent with the rules of law;* but these expressions, it will be seen, require to be carefully explained. The proposition is, indeed laid down in many cases in broad and general terms, that a usage, inconsistent with an established rule of com-

mercial law, cannot be admitted in evidence, and is wholly void; yet we have seen that in many instances, a usage thus inconsistent, when clearly proved has been allowed to prevail, and the decisions are conclusive to show that a known and definite rule of law plainly applicable, is frequently set aside and the right of the parties *wholly* determined by a hostile usage." *Duer on Ins. Sec. 66, p. 271.*

Renner v. *Bank of Columbia*, 9 Wheat. 587.

Mills v. *Bank of the U. S.*, 11 Wheat. 438.

There are many other cases where what are termed rules of law, are varied or controlled by valid local usages.

We maintain that the usage here set up does not run against any rule of law. It is a highly reasonable usage and tends to honest dealing and to protect the parties and to ascertain when the deposit as such is in fact made, and it falls within all the well established rules relating thereto.

CASES SHOWING THAT THE LEAVING OF THE CHECK UNDER THE CIRCUMSTANCES DID NOT CREATE A DEBT FROM CINNAMON TO THE BANK, FROM THAT TIME.

The case of *Boyd* v. *Emerson* is directly in point. The facts and circumstances are very like those in the case now before the Court. In that case:

"The plaintiff, receiving a check drawn upon defendants, who were his own bankers, took the check to the banking house, where he first gave some directions to a clerk upon another subject; and then while the clerk was minuting such directions, laid the check on the counter and said, 'place this to my credit.' Nothing more was said on either side and the plaintiff left the check. It was not canceled or placed to the plaintiff's credit or debited to the drawer."

On afterwards ascertaining that the drawer had overdrawn his account, the check was on the following day returned to the plaintiff.

The only difference between the case there referred to and the case in hand, is that when the check in question was placed before the receiving teller of the First National Bank, nothing was said, such as "place it to my credit." The depositor said nothing and the teller simply took the check and laid it aside for examination, under the usage referred to.

CH. J. DENMAN, in the case referred to, says:

"The plaintiff came with the cheque to the banking-house, and gave directions to Reader to provide for a bill coming due the following month. While Reader was writing down the particulars of that request, the plaintiff laid the check upon the counter, saying, 'place this to my account.' No intimation was given to him that the request would, or would not be complied with; or that Matson had overdrawn his account. If, in delivering the cheque, he had said at once 'cash me this cheque,' or 'give me credit for it,' he must have drawn from Reader a distinct answer; but by merely saying, 'place it to my account,' he leaves it upon the usual terms." * * * * * * * *

"Now, in the present case, I think the plaintiff, when he presented the cheque, should have given distinct notice whether he presented it as a cheque to be paid, or to be merely placed to his account, like other securities. In the absence of such statement by him, I draw the inference that the cheque was received in the latter character; and I therefore think the defendants are entitled to judgment." 2 *Ad. & El.*, 201.

TAUNTON, J., was of the same opinion.

PATTERSON, J., says:

"As to the first point, the fallacy in the plaintiff's mode

of putting the case, is with respect to the character in which he says the cheque was received. If the bankers received it as his agents, they stood in the same situation as any other agents, and were only bound to use due diligence in getting it paid. If they received it as the agents of Matson, the drawer, the person presenting it, if he had asked whether it would be paid or not, he would have had a right to an immediate answer; and if Reader had said 'yes,' no doubt the present declaration would have been supported. But what passes, is only this: the plaintiff, while Reader is writing down his directions on another subject, lays the cheque on the counter, and says, 'place this to my account;' nothing more is said, and the cheque is left. The inference is, that the plaintiff paid it in to Reader as his agent, to deal with it in the same manner as if it had been a cheque drawn on any other banker. *Kilsby* v. *Williams*, 5 B. and Ald., 815, is, in some respects, like this case. Abbott C. J., there says: at the outset of this cause, I thought that it was the duty of bankers, under such circumstances, immediately to tell the person presenting a cheque for payment, that they had no sufficient funds to honor it. But it was urged by Mr. Scarlett, and I thought there was great weight in the argument, that this might be productive of serious inconvenience, inasmuch *as it is often impossible to ascertain, till the close of the day at the clearing house, what sums of money may be paid into each particular account, and what are the drafts upon it. I think, therefore, that the defendant might, in this case, receive the cheque in question, subject to its being honored, or not, according to the course of Robertson's dealing with them on that day.*"—2 *Ad. and El.*, 202, 203.

WILLIAMS, J., says:

"It appears to me that this cheque was presented in the ordinary way in which a party pays in a bill to his banker; *and there was nothing to prevent the banker from having time to make inquiries respecting it,* as in the general case of bills so paid in. Having taken time for inquiry, and not being able

to find that Matson would meet the cheque by a payment at Glynn's, or otherwise, the defendants gave notice to the plaintiff; and it appears that that notice could not have been given earlier. The defendants, therefore, are entitled to our judgment on this ground."—2 *Ad. & El.*, 202, 203.

The notice was attempted to be given the next day, but did not, in fact, reach the plaintiff until the second day thereafter.

Kilsby v. *Williams*, referred to by MR. JUSTICE PATTERSON, in the case last referred to, presented these facts.

The plaintiff, on the 13th of November, 1821, paid into his own bank a check of one Robinson for £250, drawn upon it. The check was received without anything being said or any entry being made. There was in bank, which might be appropriated to the payment of this check on that day, £237. The defendants, on the 14th day of November, wrote the plaintiff a letter that the check was not paid, but that they would hold it in hopes it would be paid. On that day Robinson paid in other moneys, leaving unappropriated £93, which, with the £237 made more than the £250. It was held that the defendant, under the circumstances, could be held for the payment of the check of £250 and could not appropriate it to other checks of Robinson, which came in later on the same day.

It will be observed that there was no usage affecting either of the cases.

ABBOTT, C. J., after saying what is quoted by Mr. Justice Patterson, in the case last quoted from, says:

"And if the balance, instead of being £237, had exceeded £250, I should have had no doubt that the defendants were bound to appropriate it to the payment of the plaintiff. For when they received the cheque from him, they became

his agents to receive the money upon it as early as possible, and if they could be allowed to appropriate the money received by them to the payment of subsequent cheques, it would be doing great injustice and injury to their own customer. But I doubted at the trial, whether they would be bound to pay the cheque in part. On the 14th of November, however, a letter is written by them, in which they state that the cheque was not paid, and that they would keep it in the hope of there being money to pay it. In the course of that day money was paid in, part of which was specifically appropriated, leaving a balance unappropriated of £93. This sum being added to £237 exceeds the amount of the cheque in question, and I think, that under these circumstances, the defendants were liable to pay it, in preference both to the two cheques of £50 each and to their own balance." 5 *Barn. and Ald.* 819.

The case of the *National Gold Bank* v. *McDonald* 51 *Cal.* 67 is directly in point.

The defendant and one Barton kept a general deposit account with National Gold Bank. About 2 o'clock on the 22d of May, Barton gave McDonald a check for $785, upon the said bank. McDonald left that with the receiving teller of the bank and it was credited in the pass-book. About 3 o'clock of the same day, the bank ascertained that Barton had overdrawn his account and returned the check. McDonald refused to receive it and claimed that it had been received by the bank as cash. There was in this case proof of the usage set up in the case now under discussion.

The Court sustained the usage and held that the bank was not responsible for the check.

Among other things the Court says:

"When checks on another bank are deposited with the receiving teller, and credit for them entered in the pass-book,

it is not contended that they are received as cash or otherwise than for collection. If not paid on due presentation, they may be returned and the credit in the pass-book canceled. But it is insisted that a different rule obtains in respect to checks drawn on the same bank; and the argument is, that the officers of the bank must be presumed to know, and are chargeable with notice of the fact whether the drawer has funds to his credit, when the check is offered for deposit; that if in fact he has no funds to his credit, and the receiving teller nevertheless receives the check and enters a credit for it in the pass-book, the bank must be held to have adopted the check and to have received it as such assuming the risk of its being made good and of the solvency of the drawer."

"The argument assumes that the mere fact of the receipt of the check by the receiving teller, and the entry of it in the pass-book, of itself implies an agreement by the bank to accept it as cash, and is to be deemed, in law, as equivalent to the payment of the check. The proof shows that nothing more was done in this case. The check was handed by the defendant's clerk to the receiving teller, together with a pass-book, without any remark so far as is shown by the evidence, and the teller made the entry in the pass-book and handed it back."

"If anything more occurred, the evidence fails to disclose it. Does this transaction, of *itself*, impart an agreement by the bank to accept the check as *cash*? Is it, in law, equivalent to a payment of the check? There can be no doubt that if the bank, through its teller, expressly or by reasonable implication, from his acts and declarations at the time, agrees to accept the check as *cash*, and to enter a credit to the depositor for the amount, it will be bound by the agreement, whether the drawer of the check has funds to his credit or not. But the question here is, *whether the mere receipt of the check by the teller, and the entry in the pass book, nothing more*

being said or done, of itself constitutes in law, or is to be deemed equivalent to such an agreement."—51 *Cal.*, 67, 68.

This is the very question decided by Judge Swing for the jury.

The court then quotes largely from Morse on Banking, pp. 320, 321, and from *Boyd* v *Emerson*, and approve of that case, and then concludes as follows:

"The rule we intend to lay down is, that when a check on the same bank is presented by a depositor with his pass-book to the receiving teller, who merely receives the check and notes it in the pass-book, nothing more being said or done, this does not of itself raise a presumption that the check was received as *cash* or otherwise than for collection." 51 Cal. 70.

The court then specially refer to the case of *Oddie* v. *the First National Bank of New York*, and disapprove of it so far as it can be regarded as affecting the question in issue. The court says:

"Notwithstanding our great respect for the learning and ability of that court, we must decline to follow it, in so far as it shall appear, if at all, that in the course of its opinion it has stated propositions inconsistent with those we have announced." 51 Cal. 70.

The court concludes as follows:

"In the case at bar, the court finds as a fact that the defendant presented the check for deposit *as cash*, and that the plaintiff 'received it as such *cash* deposit and entered the amount of the same to the credit of the defendant *as cash* in the said deposit book.' On the motion for a new trial, one of the grounds specified and relied upon was that this finding was not justified by the evidence. It is not pretended that there was any evidence of an express agreement to that effect

that the check was offered and received as a *cash* deposit; and the court must have reached that conclusion, as a deduction from the facts above stated. But for the reasons already given, we think the court erred in the deduction, and the finding is not supported by the evidence." 51 *Cal.* 71.

The case of *The Bank of Hanover* v. *Keenan*, 76 N. C. R., is also in point.

Keenan had largely overdrawn his account at the bank and was called upon to make it good. Among other deposits for that purpose, he left with the bank a check in payment of such balance of one Moffat drawn upon the bank for $864, the same being left on the 6th of September. The president of the bank received this check and pinned it to a deposit slip which read: "Bank of New Hanover, deposited by W. R. Keenan, September 9, 1863, currency checks $864."

The check was held by the bank till the 13th of September, when Moffat failed. In the meantime, Moffat had paid into the bank and checked out $20,000, and the bank was, when it received this check, a large creditor of Moffat, which it collected between the time of depositing the check in question and Moffat's failure.

The court held the bank responsible for not having given notice that the check was not paid, or for not having collected it. There was evidence that Keenan, had he received due notice, might have collected the check of Moffat; and it was upon the ground of negligence, solely, that the bank was held liable.

Upon the point now under discussion, the decision was in favor of the plaintiffs here. The court say:

"Here the bank was the creditor, and the check was drawn on and was payable by the bank—the agent. The un-

dertaking of the bank was to collect a check on itself. Of necessity it must be assumed that it was presented for payment, that is, acted upon at the time it was payable by the bank.

If it was then accepted by the bank, the amount of the check became a cash deposit to the credit of the defendant, paid out of the funds of Moffat, or charged to his account with the bank. If it was not accepted, it was the duty of the agent to give notice to the holder and return the check. The bank did neither. There can be no doubt that a bank can so deal with a check that the law will imply an acceptance on its part. When the holder of a check presents it for payment, *the drawee has only a reasonable time to inspect his accounts and ascertain whether he is in funds to meet the demand; and such reasonable time is held not to exceed twenty-four hours; after this lapse of time, the holder has the right to know whether the check is accepted or dishonored.* If the holder himself presents or sends the check to the bank, he must apply, at the end of this reasonable time, to know whether it is accepted; but if it is in the hands of the bank as a collecting agent, *it* must give the notice of acceptance or dishonor."—76 *N. C. R.* 345

MR. MORSE in his book on banking, thus sums up the matter. He says:

"If the bank, as probably happens in the great majority of cases, simply takes the check without especial remark, and notes it in the depositor's bank-book, thus treating it in every respect as if it was a check upon any other bank instead of upon itself, *these facts do not create a payment or render the bank liable for the amount to the depositor.* The officers having dealt with the check in the ordinary form, have placed the bank only under the ordinary obligations, to-wit: that of collecting the check in due course of business for the benefit of the depositor. The collection is not complete and the bank does not become indebted to the depositor for the amount until the credit has been actually transferred. But nevertheless the

depositor enjoys one advantage in this case which he would not enjoy if the check were upon another bank. The duty of applying the funds of the drawer to meet it accrues as soon as the bank receives it. If there are then, or if there are subsequently deposited, while the bank holds possession of the check, funds to the credit of the drawer, the bank is bound to apply them to the payment of this in preference over any other check which shall be presented, or any other claim or lien which shall accrue *after* the deposit of this check." *Morse on Banking*, 320, 321.

The above is said without reference to any usage that might bear upon the question.

DANIELS ON NEGOTIABLE INSTRUMENTS, thus sums up this question:

"But if the cheque holder merely requested the cheque to be placed to his account, and the bank does not debit the drawer, or credit the holder with the amount, or cancel the cheque, it may return the cheque on discovering that it was an over-draft, provided it does so in time to give the holder due notice of dishonor."—2 *Daniels on Neg. Inst.*, Sec. 1621.

He then quotes from Ch. J. Denman's opinion in *Boyd* v. *Emerson*, and from Morse on Banking, and closes thus:

"In California it is considered that if the depositor hands the bank officer a cheque on another bank, and it is credited on his bank book, it is to be regarded as received for collection, and if not paid, may be returned and canceled; and that the same rule applies, even though the cheque be on the same bank, where the depositor has it credited on his account."—2 *Daniels on Neg. Inst.*, Sec. 1622.

The case of *Levy* v. *the Bank of the United States*, reported in 4 *Dall.* 234, and more fully in 1 *Binn.* is one in which it was held that a bank was bound to know the handwriting or

signatures of its depositors and therefore paid checks which should turn out to be forgeries at its peril.

The Court, however, say:

"Whether the bank is entitled to a certain time for the purpose of examination, depends upon their mode of doing business with their customers, which is a matter of fact. It is impossible that they should be able to detect every forgery, the instant it is presented; and they are thereby free from laches in communicating the detection of this forgery to the plaintiffs." 1 *Binn.*, 37.

The forged check was entered as cash in the pass-book of Levy, entered to his credit in the scratcher and cash book of the bank, and charged therein to the drawer of the check. In this case the forgery was discovered in the afternoon of the same day about four o'clock.

The court here say that a mode of doing business by the bank with its customers, might change this rule—in other words—a usage of the bank relating to the matter. And this in reference to the signature of the drawer of check, which always comes before the receiving teller when he receives the check; the state of the account cannot always be before him.

If a mode of doing business might affect the question of the paying of a check, and give the bank time for examination and inquiry, how much more reasonable and necessary is the usage set up in this case?

The difficulty of the plaintiff in knowing the state of the account as deposits are made, is alluded to by Judge Swing, and will be apparent by an examination of the diagram showing the banking room of the plaintiffs and the relative situations of its officers, tellers, clerks, &c.

There are other cases bearing upon this point.

The authorities are decidedly against the ruling of Judge Swing, as applied between the depositor and the bank; but THE RULE WHICH HE STATED HAS NO APPLICATION AS BETWEEN THESE PARTIES.

Burkhardt was not a depositor of the check in question; there was no confidence between him and the bank in relation to it, and no credit to him. The rule is one governing the relation between the bank and its depositors, whatever it may be, and cannot be applied as between these parties.

That this question might properly be affected by usage, is, we think, well established.

Nat. Gold Bank v. *McDonald*, 51 Cal., 66.
Bank of Wash. v. *Triplett*, 1 Pets., 32, 33.
Oddie v. *First Nat. Bank of N. Y.*, 45 N. Y. R., 741.
Levy v. *Bank of the U. S.*, 1 Binn., 37.
Mills v. *Bank of the U. S.*, 11 Wheat, 438.
Renner v. *Bank of Columbia*, 9 Wheat, 587.
Dor. & Mil. Bk. v. *N. E. Bk.*, 1 Cush, 188.
Bridgeport Bk. v. *Dyer*, 19 Connt, 140.
Tounsend v. *Whitley*, 5 Harr., 56.

JUDGE SWING ALSO ERRED IN WHAT CONSTITUTED A GENERAL USAGE.

Nor was Judge Swing entirely accurate in his charge as to the universality of the usage.

"But, in regard to this custom, if a custom of the kind were permitted to obtain, it should be a custom applicable to all banks in the city of the same character, and not to that of a certain extent of business—to all banks of the character of this bank." *Printed record, p.* 16. * * * * *

"A custom, in order to make it good, must be applicable

to all the banks or all the mercantile houses of the character of the business they do, and the responsibility of checks upon themselves by depositors, whether it be large amounts or small ones."—*Printed record, p.* 17.

MR. DUER says:

"It is not necessary that the usage, when it is a usage of trade, or, in the technical application of words, to be uniform, should be universal; that is, should be followed at all times by all persons or vessels concerned or employed in the trade to which it relates; for this would be inconsistent with the meaning which, in these cases, is attributed to the word general; but the word 'uniform,' certainly denotes, in all cases, a constancy in the observance of the usage in the form that properly belongs to it, and according to its character and extent. Thus, a usage arising from the acts of a majority of the persons connected with a particular trade, must be constantly observed, in the same manner, by such a majority, although the persons composing that majority may, doubtless, vary. The usage must preserve, at all times, its essential character. It must not now be general, and then local or partial, followed this year or month, and abandoned the next."—1 *Duer on Ins.*, Sec. 58, p. 264.

At the very small banks, where the same person is not only cashier, but receiving and paying teller, and where there are but a few transactions in the day, there would be no call for such usage; and there is a fair ground for the distinction between such banks and the large banks having numerous daily transactions; and the usage may be valid and binding, though some of the small bankers do not always follow it.

We have thus far considered the case as it stands upon the exception to the general charge of the court.

This charge became somewhat confused to the jury by

the reading of long quotations from the authorities. A charge should be short, direct and to the point. It is not often that the very learned judge falls into such an error. He presented the law of usage erroneously, and in such way that the jury was likely to be mislead upon the point in question; and for the error in the general charge, the judgment should be reversed.

IV.

THE COURT ERRED IN REFUSING THE PLAINTIFF'S SPECIAL CHARGES.

In a long qualification and commentary, upon CHARGE 7 as asked, in speaking upon the subject of usage, Judge Swing says:

"With reference to this portion of it—charge of counsel, I mean, gentlemen of the jury, you should not permit your minds to be diverted from the true issue of this case, by the numerous instructions which have been given or refused. Sometimes the Court may give so many instructions as that it would have a tendency to confuse the jury, or may give them so indefinitely and so generally as not to be well understood by the jury, and the instructions refused and the instructions given upon asking of counsel, may have the same tendency; *but you should keep in mind as clearly as you can the principles which have been given you in the general charge.*" *Pr. Rec. p.* 19.

There were seven charges asked by the plaintiffs. I do not remember the number asked by the defendants. I think the Court felt conscious that by its long general charge and

long quotation from authority, there was the danger to which I have alluded above. Here is a direction for the jury to pass by the special charges that are given, which I think cannot be defended.

Ordinarily I do not know of any difference between the general charge and charges given upon request, unless the former presents the whole case clearly and fairly to the jury. But passing this, let us look at the special charges.

CHARGE 4, was in these words:

"That if the check of Cinnamon in favor of Evans, Lippincott & Cunningham, for $10,997.10, was simply handed into the First National Bank, either to the receiving teller or the cashier, without the passbook, to be examined and passed as a deposit, after bank hours, and it was placed away for that purpose, and was not examined or passed upon, or placed to the credit of Evans, Lippincott & Cunningham, or received as a deposit until after banking hours, then it did not become a debt as between Cinnamon and the bank until after it was so passed upon." *Pr. Rec.* 18.

This is one of the special charges to which the remark of the court applies. It refers however, to the action and express understanding of Evans, Lippincott & Cunningham, in handing in the check, and to the action and understanding of the receiving teller of the bank in taking it and placing it aside for examination.

CHARGE 5, was in these words:

"That if checks of John Cinnamon on the bank were left at the bank on the 23d of February, 1875, but were not passed upon by the receiving teller, or received as a deposit, nor entered in any pass-book or other book of the bank to the credit of the parties leaving them, but were laid aside for

examination until after bank hours, when an examination could be made to see whether Cinnamon's account was good, then they did not become a debt of Cinnamon to the bank until they were so passed upon and entered." *Printed record*, 18.

The court refused this charge as asked, but gave it adding the words:

"*If it was handed in as a deposit, it became a deposit at the time it was received.* Taking the surrounding circumstances into consideration, if it was received by the teller as a deposit, it became a deposit—that I give you, for it has these words in it, 'or received as a deposit.'"

Now, what took place, was this: Evans, Lippincott and Cunningham handed this check to the receiving teller without the pass-book. His purpose, of course, was to deposit it. It was received by the teller and placed aside for examination, with reference to its being credited, if found good. This qualification, under the circumstances, was such, when taken with the general charge and the admonition of the court, to observe the general charge rather than the special charges, as was likely to mislead. The jury might well reason: Of couse it was handed in to be deposited, or as a deposit, and the teller having received it, must, of course, have received it as such. The usage having been brushed out of the way, the jury was very likely to have reasoned in that manner.

The simple handing it to the receiving teller to be deposited and the receipt of it by him, and placing it aside, was enough to fulfill the requirements under this qualification and under the general charge before alluded to.

We maintain that we were entitled to that charge *as asked.* It is in accordance with the authorities before referred to, and

with honest, fair dealing between the depositor and the bank.

CHARGE 6:

"If the receiving teller of the First National Bank had received instructions from the proper officers of the bank not to receive Cinnamon's checks on deposit, or credit them to parties presenting them, until they were ascertained to be good, after close of bank hours, when the accounts were passed upon, and the receiving teller did not receive them as a deposit, pass upon them, or enter them to the credit of the parties, but as they were handed in, placed them aside for examination, and to pass upon them afterwards, then such checks did not become a debt, as between Cinnamon and the bank, until they had been thus examined and passed upon." *Printed record, p.* 19.

Which charge the court refused to give as asked, but gave with the following qualification:

"*If he leaves the check as a deposit, without any conditions, it became a deposit at once.* I would give that, with the conditions, that it was so understood by the depositor that it was so received at the time of the deposit."

Now, here it comes out again that the leaving the check as a deposit, without anything being said at the time, it at once became a deposit, and, under the general charge, a debt from Cinnamon to the bank, to be deducted from the call loans. This qualification made pointed and prominent, the instruction, that if the check was handed to the teller as a deposit, it at once became such, unless an express condition was attached to its reception; and this, irrespective of the fact that the pass-book was not there, and irrespective of the fact that it was not acted upon or credited to Evans, Lippincott

& Cunningham in any way, and irrespective of the general usage.

According to the authorities presented when considering the general charge, this charge should have been given *as asked.*

CHARGE 7:

"That if, at the First National Bank there had been for a long time, a usage by which the receiving teller entered checks drawn on the bank in the pass-book of the depositor as they came in, subject to a return of the checks to the depositors, if, in the afternoon of the day when the accounts were examined, the checks were found not to be good, and to return the same to the party depositing them, and such were then made good by the depositor, and if such usage tended greatly to facilitate the business of the depositor, and of economy of money in the management of the bank and of time to the depositors, tended to prevent inconvenience and confusion at the bank and give greater security to the bank and depositors, and if such usage was notorious among the customers of the bank, then such usage would be a valid and legal usage as between the depositors and the bank." *Pr. Rec.* 19.

Which charge the Court refused to give as asked, but gave with this long qualification:

"Nothing in this case shows that Mr. Evans knew anything about this usage. *As to the question of general use, I have said that it was not competent to change the law in the case, when the deposit was made, without anything said about the deposit by the persons receiving the deposit; the law made that a debt against the bank in favor of the depositor;* but if the depositor knows the usage in cases of that kind, why, as a matter of course, it will change it. With reference to this portion of it—charge of counsel—I mean, gentlemen of the jury, *you should not permit your minds to be directed from the true issues of*

this case by the numerous instructions which have been given or refused. Sometimes the Court may give so many instructions as that it would have a tendency to confuse the jury, or may give them so indefinitely and so generally as not to be understood well by the jury, and the instructions refused and the instructions given upon asking of counsel may have the same tendency; *but you should keep in mind as clearly as you possibly can the principles which have been given you by the Court in the general charge.* It is for you to determine in this case what was embraced within the guaranty, as I have defined it to you, and as I have implied it, and it is for you to determine the great and important fact in the case when the guaranty was signed; if signed before these checks were received—any of them—then there is no question about it; if signed after the checks were received—any one of them— it is for you to examine into the testimony and ascertain in what way the checks were received, and bearing in mind the rights of the parties holding the checks, as defined to you by the Court, particularly those coming from the clearing house, applying the testimony as to the question of time, and determine whether or not it was signed before or after the reception of these checks, or at what stage of progress, and to examine or investigate what the checks were which had come from the clearing house." *Pr. Rec.* 19, 20.

This is a pretty long qualification of the charge asked, and a somewhat singular one, hardly justified by anything that took place at the trial. I say this with great respect for the *very able* AND MOST UPRIGHT JUDGE, who presided at the trial, *for such I know him to be.*

A SPECIAL USAGE OF A PARTICULAR BANK IS BINDING ON ITS CUSTOMERS THOUGH THEY HAVE NO KNOWLEDGE OF THE USAGE.

This qualification of the charge raises another question, to-wit: Whether a usage of a particular bank of long stand-

ing and notorious among its depositors, can be given in evidence effecting the question of fact as to the checks becoming a debt from Cinnamon to the bank without presenting proof, at the same time, that the depositors, those presenting the checks had knowledge of the usage.

It will be born in mind that Evans, Lippincott & Cunningham would get credit for the money, when it became a debt from Cinnamon to the bank. Was it therefore necessary to show that they had knowledge of this usage, they being customers of the bank?

It is not perhaps important to present this question, for in the general charge and in the qualification to this charge the court rejected it, even as a general usage.

But the plaintiff was entitled to the charge *as asked.*

This very question has been settled by this court in the broadest manner, both upon the point of usage and upon its effect upon the rules of law.

In *Mills* v. *the Bank of the United States*, 11 Wheat. 438, the court says:

"Another question is, whether the usage and custom of the bank, not to make demand of payment until the *fourth* day of grace, bound the defendant unless he had personal knowledge of that usage and custom. There is no doubt that according to the general rules of law, demand of payment ought to be made on the *third* day, and that it is too late if made on the fourth day of grace. But it has been decided by this court upon full consideration and ~~agreement~~ allowance in the case of *Renner* v. *The Bank of Columbia*, 9 Wheat. Rep. 582, that where a note is made for the purpose of being negotiated at a bank, whose custom, known to the parties, it is to demand payment and give notice on the fourth day of grace, that custom forms part of the law of such contract, at least so far as

to bind their rights. In the present case, the court is called upon to take one step farther, and upon the principles and reasoning of the former case, it has come to the conclusion, that when a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment and give notice on the fourth day of grace, the parties are bound by that usage, *whether they have a personal knowledge of it or not. In the case of such a note, the parties are presumed by implication to agree to be governed by the usage of the bank at which they have chosen to make the security itself negotiable.*" 11 Wheat. 438, 439.

In the case of *The Dorchester and Milton Bank* v. *The New Eng. Bank*, 1 Cush., 188, where a similar question was presented, the court say:

"It seems, however, that the usage of a bank is binding on all persons dealing with the bank, *whether they know of the usage or not.*"—1 *Cush*, 188.

In the case of *The Lincoln and Kenebeck Bank* v. *Page*, 9 Mass, 155, a usage of that bank was proved to the effect, that where a note was payable in the bank, they gave the party notice thereof before it became due, and did not demand it of him on the day or give notice of non-payment thereof, the court say:

"The general rule of law requires a demand and notice to charge an indorser. This had not been altogether dispensed with by any usage or stipulation, but modified as to the time and manner," etc.—9 *Mass*, 157, 158.

In the case of *The Bank of Washington* v. *Triplett et al.*, this court say:

"It was proved at the trial, that this was according to the usage of that bank. The counsel for the defendant moved

the court to instruct the jury that this usage *could not bind the endorser, unless he had personal knowledge of it, at the time he endorsed the note.* The court refused to give the instruction, and the jury found a verdict for the bank, on which judgment was rendered. That judgment was brought before this court and affirmed. The court said, that 'when a note is made payable and negotiable at a bank, whose invariable usage it is to demand payment and give notice on the fourth day of grace, the parties are bound by that usage whether they have a personal knowledge of it or not.' In the case of such a note, the parties are presumed, by implication, to agree to be governed by the usage of the bank at which they have chosen to make the security itself negotiable."—1 *Pet., p.* 33.

MR. MORSE IN HIS TREATISE ON BANKING, speaking of this subject says:

"Knowledge of the usage, either express or implied, must, it has been said, be brought home to the parties who are to be bound by it. But other cases of high authority declare that the usage of the bank in collections will bind the persons dealing with it in this business whether such usage be known to them or not; *and this is certainly the correct rule.* Indeed the opposing cases can be easily reconciled by the link which appears to be suggested in one of them. The fact that one deals with the bank without taking the trouble to inquire as to its system, will raise the implication that, he already knows and is satisfied with that system." *Morse on Banking*, 336.

Many cases might be cited to the same effect. But it is unnecessary. The above clearly show that the plaintiff was entitled to CHARGE 7 as asked.

This question of usage upon the point in controversy, is of great importance to the business community and to banks and bankers. Depositors have no right to receive credit at

banks when they have no money, or for checks that are worthless. It is evident that without some such usage, much fraud might be practiced upon such institutions. As stated by Mr. Justice Strong in the case before alluded to, it is practically impossible for any banker to know at all times the state of the account of each depositor. In very small banks where the same man acts as book-keeper, receiving and paying teller, cashier, and president, and where very few transactions are had from day to day, it may be done, but in banks like the First National, it is practicably impossible, and I do not think that Judge Swing's charge upon that subject is accurate.

A usage of the kind may well be proved though it be not practised at very small banks. The usage is an honest one, tends to fair dealing and economy and to the protection and security of those dealing with the banks, and is of the general character of many other usages, which have changed the former rules and become a part of the commercial law. Nearly all that law had its origin in usage, which changed what had before then been regarded as the law. Indeed usage is the basis of all the common law. It is the mode in which people have lived, acted toward one another, and done their business recognized as law because, and solely because, it had been long practised and acquiesced in.

This general usage, indeed the usage at this bank, was an important element in ascertaining whether what took place, raised a debt at once upon the receiving teller's taking the check and placing it aside for examination.

It is not an uncommon practice for depositors leaving many checks with the bank, to bring in the pass-book with these checks in them and leave it with the receiving teller, and not desiring to wait until their turn comes, to pass out of the

bank; the teller in such cases places the pass-book containing the check aside for examination after the close of bank hours. Is that a deposit? It is under Judge Swing's charge. The depositor leaves it as a deposit and the receiving teller accepts it without saying anything, relying upon the usage, and under this charge the depositor is entitled as a matter of law to be credited with all those checks whether good or not. That case does not differ from the one before the court. Evans did not demand that the check be examined or credited—indeed was in no condition then to receive the credit, for he did not have his pass-book, and the receiving teller put it aside for examination after the rush of depositors had stopped. Surely here was nothing that could be regarded as an agreement between the parties to pay such check to Evans, Lippincott & Cunningham, and to take Cinnamon for it. That could not have happened,—the receiving teller had received notice not to receive Cinnamon's check in any other way, and though this instruction may not have been known to Evans, yet it clearly shows that the receiving teller could not have understood that he was crediting Evans for the check and receiving Cinnamon as the debtor therefor. The consent and understanding of the bank was necessary to make this a deposit and to create a debt between him and the bank for the amount. *See authorities cited on pp.* 13 *to* 24 *and there quoted from.*

It is in reference to acts of this character that the ordinary office of a usage applies. They were equivocal in their very nature, just as consistent with the view of the plaintiff, as with that of the defendant,—indeed more so—and the real understanding of the parties could not be fairly reached without re

garding the usage, certainly the intent of the bank could not be ascertained without regard to the usage.

In the case of *Oddie* v. *The National City Bank of N. Y.*, the bank continued to certify the check of Davis & Aiken long after they knew their account was overdrawn and after the leaving the check there in question. That fact greatly influenced the opinion of the Court.

Besides there was no proof of any usage in that case affecting the point here in issue. In their opinion the Court seem to recognize the binding effect of usage in such business, but there was no proof of any particular usage But this case has not been followed and stands alone. It is contrary to the decisions of the English Courts, and to those in this country and cannot therefore be regarded as of binding authority here. We think Judge Swing erred all through the case, not only in regard to usage, special and general, but in regard to what was a complete deposit, transferring the money to Evans, Lippincott & Cunningham and creating a debt between Cinnamon and the bank, but as to the general character of the guaranty.

If this case must go back for another trial, so far as the questions are found in this record, it is to be hoped that the Court will pass upon them.

All of which is respectfully submitted.

T. D. Lincoln,

Of Counsel for the Plaintiff.

OFFICE SUPREME COURT U. S.
FILED
MAR 30 1880
D. W. MIDDLETON, Clerk.

Supreme Court of the United States,

FIRST NAT BANK vs. FREDERICK BURKHARDT.

POINTS.

I.

The suit was brought to recover $20,000, loaned John Cinnamon, upon the credit of the defendants' written guarantee, and which was in part appropriated to pay a check of Cinnamon's deposited the same day at the bank, by Evans, Lippincott and Cunningham. The defendants claimed that the check was left at the bank and became a debt from Cinnamon to the bank before the guarantee was signed; whereas, the plaintiff claimed that the check did not become a completed deposit until after the guaranty was given; and proved a general usage of the banks of Cincinnati, and of the First National Bank, by which checks left for deposit were received and entered in the pass-book, subject to examination as to goodness of the account and to return of the check to the depositor the same day, if not good.

II.

If the check came into the bank, before the guaranty was signed and was received by the bank before the close of bank hours, and when the bank could not, according the usual course of banking business, know the state of the

account, until after the close of banking hours, when the accounts were examined and the check was thus held by the bank after the signing of the guaranty, it was a debt falling under the guaranty in question.

III.

A check of one depositor of a bank drawn upon the bank in favor of another depositor, and left by the latter as a deposit with the bank in the ordinary course of business, nothing being said at the time, is subject to examination during the same day and to return within reasonable time during the day to the depositor, and he is not entitled to a credit of the same, simply because the receiving teller received it without any conditions expressed relating to such examination.

Boyd v. *Emerson*, 2 Adol. and El. 201.
Kilsby v. *Williams*, 5 Barn. and Ald. 818.
National Gold Bank v. *McDonald*, 51 Cal. 67.
Bank of Hanover v. *Keenan*, 76 N. C. R. 345.
Levy v. *Bank of the United States*, 1 Binn. 37.
Oddie v. *National City Bank*, 45 N. Y. R. 741.
Morse on Banking, 320, 321.
Daniels on Neg. Ins., Sec. 16, 21.

IV.

There is no definite rule of law which makes a check then received at a bank from a depositor, without condition expressed at the time, a credit to the depositor if the account of the drawer of the check is not good when left, nor during the day afterwards.

See authorities under III.

V.

If there were any rule of law such as was laid down by the Circuit Court, it was subject to a usage among the bankers, by which the check could be returned the same day, if upon an examination of the account early after banking hours the check was found not good.

Bonner v. *Bank of Columbia*, 9 Wheat. 587.

Mills v. *The Bank of the United States*, 11 Wheat. 438.

Swift v. *Giffard*, 2 Low. 113.

Clark v. *Baker*, 11 Met. 189.

Wigglesworth v. *Dallison*, Doug. 201.

National Gold Bank v. *McDonald*, 51 Cal. 66.

Bridgeport Bank v. *Dyer*, 19 Conn. 104.

Oddie v. *National City Bank*, 45 N. Y. R. 741.

Levy v. *Bank of the United States*, 1 Binn. 37.

Farm. and Mech. Bank v. *The Cham. Tr. Co.*, 18 Vt. 139, 140.

Same v. *same*, 23 Vt. 208.

McMaster v. *The Penn. R. R.*, 69 Penn. St. 378.

Van Santvoord v. *St. John*, 6 Hill. 140.

Hutchens on Carriers, Sec. 366.

Gibson v. *Cutter*, 17 Wend. 305.

In *McMaster* v. *The Penn. Railroad Co.*, the court says: "That a custom or usage will control the general law of liability of carriers is shown by many cases." 69 *Penn St. R.* 378.

See quotations in Brief., pp. 10 to 13.

VI.

The usage of the First National Bank of Cincinnati, to the same effect, of long standing and notorious among the customers of the bank, was binding upon the depositors of the bank, whether the depositor knew of such usage or not.

Mills v. *The Bank of the United States*, 11 Wheat. 438.

Bank of Wash. v. *Triplett*, 1 Pets. 32, 33.

Dor. and Mil. Bank v. *New England Bank*, 1 Cush. 188.

1 *Duer. on Ins.*, Sec. 58, p. 264.

Morse on Banking, 336.

Farm. and Mech. Bank v. *Champ. Tr. Co.*, 18 Vt. 139, 140.

In the case of the *Farmers' and Mechanics' Bank* v. *The Champion Transportation Co.*, says:

"In the absence of any special contract between the parties, in relation to the subject, the duty and liability of the defendants must be determined by the law applicable to carriers of *this description.* This liability may be modified by contract, *by general usage of the business, or by the defendants' particular usage.*" 18 Vt. 139, 140.

See quotations in Brief pp.

VII.

It is not necessary that the usage should embrace all the banks of Cincinnati, or the very small banks, if it be general among the banks of the class of the First National.

Vallance v. *Dewar*, 1 Camp. 508.

Ongier v. *Jennings*, 1 Camp. 506.

1 *Duer on Ins.*, Sec. 58, p. 264.

"If the usage is general, it makes no difference for this purpose, that it is not uniform." 1 *Camp.* 504.

"Although there should be an exception as to the usage that would be immaterial." 1 *Camp.* 508.

See also quotations in Brief, p. 25.

Respectfully submitted,

T. D. LINCOLN,

Of Counsel.

101 — Mass

SUPREME COURT OF THE UNITED STATES
APR 1 1880
O. W. MIDDLETON, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 234.

FIRST NATIONAL BANK OF CINCINNATI

vs.

FREDERICK BURKHARDT,

Error to the circuit court of the United States, sitting in the Southern District of Ohio.

STALLO & KITTREDGE,
SAGE & HINKLE,
Counsel for Defendant.

Judd & Detweiler, Printers.

Supreme Court of the United States.

No. 234.

FIRST NATIONAL BANK

vs.

FREDERICK BURKHARDT.

POINTS FOR DEFENDANT IN ERROR.

I.

The court below might properly have refused the special charges asked, the general charge being full, covering the whole case, and submitting it properly to the jury.

Indianapolis Railroad *vs.* Horst, 93 U. S., 291.

For the general charge upon the question of usage, see printed record, pages 15, 16, 17.

II.

If the bank, the plaintiff in error, before the execution of the guaranty sued upon, accepted and received, *on deposit*, checks drawn upon it by John Cinnamon, it thereupon became indebted to the depositor, and creditor of John Cinnamon to the amount of such checks, and the guaranty does not include such transaction.

Thompson *vs.* Riggs, 5 Wallace, 663, 679.

Oddie *vs.* National City Bank of New York, 45th New York Reports, 735, 741, 742.
Pratt *vs.* Foot, 9th New York Reports, 463, 466, 467.
United States Bank of Georgia, 10th Wheaton, 333, 343.
Levy *vs.* Bank of the United States, 1 Binney, 27,36.
Morse on Banks and Banking, 26, 27 (effect of deposit.)

III.

The defendant, as guarantor, could only be held by the strict terms of the obligation into which he had entered. This is the law of Ohio, where the guaranty was entered into and to be performed. There is no reason nor authority for giving it an expanded signification beyond the fair import of the terms.

Palmer *vs.* Yarrington, 1 Ohio State, 258, 260.
President, Directors, &c., Merchant's Bank *vs.* Heard, 5 Cushing, 461, 468.
Russell *vs.* Clarks Exr's., 7th Cranch, 69, 70.
Mauran *vs.* Bullus, 16 Peters, 528, 537.
Bell *et al. vs.* Breun, 1 Howard, 169, 186; 7 Metcalfe, 516.
Lawrence *vs.* McCalmot, 2 Howard, 426, 449.
Lee *vs.* Dick *et al.*, 10 Peters, 482, 493.

IV.

As to usage or custom—

1. It must be ancient, reasonable, generally known, and certain.

United States *vs.* Buchanan, 8 Howard, 83, 102.

2. Must be general as to place, and notorious; not con-

fined to a particular bank. It must be the rule of all the banks of the place.

Adams *vs.* Otterback, 15 Howard, 539, 545.

3. Not allowed to operate unless contract made with reference to it, and known to the other contracting party.

Bliven *vs.* New England Screw Company, 23 How., 420, 431.

Barnard *vs.* Kellogg, 10 Wallace, 383, 394.

4. Office of it to ascertain and explain the meaning and intention of parties to a contract. It must not be inconsistent with the contract nor contradict it. "It may be admissible to explain what is doubtful; it is never admissible to contradict what is plain."

Barnard *vs.* Kellogg, 10 Wallace, 383, 390, 394.

5. Even if it can be applied to the mode of dealing of a particular house, a party cannot be bound thereby unless he be shown to have had notice of it.

Chitty on Contracts, 11th Am. Ed., 84.

Moore *vs.* Voughton, 1 Starkie, 396.

V.

Guaranty entered into after contract, to which it relates, must have valuable consideration to support it.

Bickford *vs.* Gibbs *et al.*, 5 Cushing, 154, 156.

VI.

The Court did not err in refusing plaintiffs special charges.

1. Every charge that was asked was given; charge 4, without qualification; charge 5, with a qualification, correct according to the authorities above cited; and the quali-

fication to charge 6, is also in accordance with the authorities. The qualification to charge 7 also follows the authorities.

2. The Court had in its general charge, given the law to the jury fully and correctly, and was perfectly right in directing the jury to keep in mind the principles therein stated.

3. The Court is not bound to give instructions in the form and language in which they are asked. If those given sufficiently cover the case and are correct, the judgment will not be disturbed, whatever those may have been which were refused.

Railway Co. *vs.* McCarthy, 96 U. S., 258–265.

VII.

The bill of exceptions is fatally defective—

1. The action is upon a written guaranty. The bill of exceptions refers to it as Exhibit A, and as attached to and made part of the bill. But it is not attached.

2. Exhibits not contained in the bill are not regarded.

Reed *vs.* Gardner, 17 Wall., 410.

3. Where the ruling of the court on letters and papers is made the subject of exception, they must be inserted in the bill.

U. S. *vs.* Dunham, 21 Law Rep., 591.

3. The rulings of the court on evidence can only be considered by bill of exceptions.

Suydam *vs.* Williamson, 20 Howard, 428.

4. The fact that a copy of a paper is attached to a pleading in the case which purports to be the same as the paper mentioned in the bill, does not make it a part of it, nor can

the court presume that it is the same paper read in evidence and excepted to.

Leftwitch *vs.* Lecanu, 4 Wall., 187.

5. Had the guaranty as declared on in the plaintiff's petition been admitted by the answer, or had the copy set out in the answer been admitted by the reply, that would be sufficient under the rules of pleading in the State of Ohio, but such was not the fact. See pages 1, 4 and 5, printed record.

6. The fact that what purports to be a copy of the guaranty is contained in the general charge to the jury, does not dispense with the necessity of presenting it in the bill of exception.

Generes *vs.* Boummer, 7 Wall., 564.
Avendano *vs.* Gay, 8 Wallace, 376.
Graves *vs.* Campbell, 11 Wallace, 193.

Respectfully submitted,

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